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WHEN A STEP-FATHER MAY BRING SUIT TO RECOVER FOR INJURIES TO HIS STEP-SON.

The above subject is an interesting one. In the code states almost the universal practice is to ask the court to appoint a next friend to bring suit for a minor who has suffered injuries because of the negligence of a third party. Generally the father is appointed next friend for this purpose. A code provides that a father is the natural guardian of his minor children, not only of the person and education, but also his estate. At common law he was not permitted to become the guardian of his estate. It was by express provision of a code that he was made also the guardian of his estate. Keeping in mind that a code was enacted for the purpose of unifying, simplifying and expediting the cumbersome procedure of the common law, it is plain that the recognition of the father as the natural guardian of his minor son's estate, was a double blessing, in that its effect was to do away with the circumlocution necessary for the appointment of a next friend to bring suit, and recognized that the father was, by his very relationship, the person who would take the greatest interest in his child's welfare, while, at the same time, the code did not take away the necessity of a bond, in a proper case, by the natural guardian.

The fact that in spite of this provision in the code, which permits a father to bring suit directly for his infant son, the practice has continued the same as under the old common law, of going into court and asking for the appointment of a next friend, to bring suit for a minor, shows the force the common law methods continued to exert.

This force of habit neglected to recognize the simpler method a code was intended to and does provide.

It is one of the evidences which shows how the common law spirit, which pervaded the land when a code was adopted, was breathed into the construction of the code system till the very objects of the code have been so perverted as to lose the most for which

a code was intended, by its author, David Dudley Field. David Dudley Field will be appreciated when the code states come to a full understanding of the nature and objects of a code. This means thorough reconstruction.

It is certain that when a lawyer asks the court to appoint the father of a minor child, as his next friend to bring suit for such child, he has not understood that the code had provided that he could have brought the suit in the name of the child's father, as his natural guardian, without going into court to obtain such right. The code made him by virtue of his natural guardianship also his lawful guardian of his estate.

That Judge Barclay was fully conversant of the truth of the position, we have above set forth, is shown in the case of *Brandon v. Carter*, 119 Mo. 572. This was a case where a father had joined with his minor children in a suit to recover an interest in real estate. Judge Barclay says: "But it is then insisted that the proceeding is fatally defective because the minors therein were not represented by any guardian, curator or next friend, as required by law. There are at least two answers to that proposition. First. The father of these minors was their natural guardian. R. S. 1889, sec. 5379. He was joined with them as plaintiff and was authorized (in the absence of any showing that they had a curator) to represent them in all legal proceedings. R. S. 1889, secs. 1997 and 5298. The fact of this relationship appeared on the face of the petition for the appointment," so there was a substantial compliance with the requirements of law." In the case of *Temple v. Price*, 24 Mo. 289, the objection was made that the plaintiffs had no capacity to sue, having no guardian appointed according to law. The father had joined his children in the suit. Judge Scott, delivering the opinion of the court, said: "This suit was begun under the revised code of 1845. The first section of the act concerning guardians in that code makes the father the natural guardian of his child. The seventh section of the same act empowers all guardians and curators to prosecute and defend for the minors in all matters committed to the case of such guardians and curators respectively, without further admittance in the several courts of the state.

Natural guardians have the care and custody of the education, estates and persons of their wards, they giving bond and accounting as other guardians." The demurrer which was sustained by the lower court was overruled. This is sufficient to show that the father has a right under the code, as the natural guardian to bring suit for his infant child.

The subject of this article relates to the right of a step-father to bring suit for his step-son. Schouler on Domestic Relations, 5th Ed., sec. 273, says: "Yet if a step-father voluntarily assumes the care and support of a step-child he stands *in loco parentis* for the time being, and the presumption then is that they deal with each other as parent and child and not as master and servant, in which case the ordinary rules of parent and child will be held to apply." That is to say, that he is then the lawful guardian by reason of his acceptance of the relationship, the responsibility for his necessities, etc. See also *Id.* Sec. 237. There is no doubt but that the step-father is not bound to support his step-child unless required to by statute. Says Schouler, sec. 237: "In the absence of special statutes to the contrary the father, in law, is not obliged in this country to support his step-children, consequently is not entitled to their earnings," citing *Commonwealth v. Hamilton*, 6 Mass. 253, 275; *Re Besondy* 32 Minn. 385, 113 Ill. 451; *Bond v. Lockwood*, 33 Ill. 212. In *St. Ferdinand*, etc. v. *Bobb*, 52 Mo. 361, the court says: "In *Stone v. Carr*, 3 Esp. 1, Lord Kenyon, referring to cases which were supposed to establish a different doctrine says there is no doubt if a man marry a woman having children by a former husband, he might refuse to provide for them, and could not be required to do it; but if he did not refuse to entertain them, and took the children into his family, he thereby stood in the place of a parent as to them, and having gone abroad, and left them in care of his wife, he should be held bound by her contracts made for their maintenance and education." And, he adds, had their father died insolvent, it would not alter the case.

It follows fully and undoubtedly that a step-father standing *in loco parentis*, would have the same right as his natural father to bring the action for his step-son's injuries; as the code provides that when there is no lawful father the mother is the natural guar-

dian. It is not a matter of question that the step-father is the lawful father and stands *in loco parentis* when he holds himself out as such. He then becomes the natural guardian, and, as such may bring suit in his own name to recover for his step-child's injuries.

NOTES OF IMPORTANT DECISIONS.

TORTS — MALICIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS.—A very interesting case on the question stated as the subject of this note is that of *Banks v. Eastern Railway & Lumber Co.*, 90 Pac. Rep. 1048, where the facts disclosed that an employer retained a part of the wages of his employees for medical service. Employees selected a physician and notified the employer to pay their hospital dues to him. The physician issued to each of the employees a certificate entitling them to medical treatment at his hospital. The employer refused to pay the dues to the physician, and notified his employees that they would be paid to a hospital, and any employee not consenting to such payment would be discharged. The Supreme Court of Washington held that the physician had no cause of action against the employer on the ground that he caused his employees to breach their contracts, though his acts were malicious. The court said: "The only question before us is whether the honorable trial judge erred in sustaining the demurrer. He did not, as the amended complaint fails to state facts sufficient to constitute a cause of action. The respondent was entitled to employ its servants upon the conditions alleged. It had a perfect right to contract for the retention of reasonable hospital fees, and reserve to itself the privilege of selecting the physician to whom such fees should be paid. The contract, which did not profit the respondent, was made for the direct benefit of its employees. Appellant made no agreement with the respondent. There was no privity of contract between him and respondent. The contract between the respondent and the employees was not made for the benefit of appellant, and he had no right of action thereon. If appellant made any contract which has been violated, it was with the 56 employees to whom he issued the hospital certificates. He cannot dictate the manner in which the respondent shall conduct its business, nor can he, by any agreement with respondent's employees to which respondent is not a party, compel it to change the terms of its contracts of employment."

MASTER AND SERVANT—LIABILITY FOR WILLFUL TORTS OF SERVANT.—A very interesting discussion of the much confused question as to the liability of a master for the willful torts of his servant committed in the course of his employment is contained in the opinion of the Supreme

Court of Georgia, in the recent case of *Savannah Electric Co. v. Wheeler*, 58 S. E. Rep. 38, where the court held that where a petition alleged that a conductor on the car of a street railway company, while engaged in the prosecution and within the scope of his business in collecting fares, failed and refused to give a passenger correct change, and, upon request therefor, drew a pistol and fired at the passenger, but that the ball missed the passenger and struck a woman passing on the public street through which the car was running, causing her death, and that the plaintiffs were the husband and children of the decedent, the allegations set out a cause of action against the company, and the petition was not demurrable.

Justice Lumpkin said: "Expressions used in some reports and text-books, that a master is bound by the acts of his agent or servant in the scope of his agency and in furtherance of the master's business, or when the servant is acting for the benefit of the master, do not mean that the agent's act must be beneficial to the master or the latter is not bound. If any declare such a rule as that the master is bound by torts of the servant which benefit him, but not by any others, we cannot accept it as the rule in this state. In this matter, as in some others, there has been an evolution in the law, arising from the growth and change in corporate life and activity, and the better study of them. In *Central Ry. Co. v. Brown*, 113 Ga. 415, 38 S. E. Rep. 989, 84 Am. St. Rep. 250, it was held that: 'A master is liable for the willful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. This rule applies as well where the master is a corporation as where he is a private individual. A railroad company is liable as a trespasser to a passenger for an unjustifiable assault made upon him by the conductor of the train; the conductor being engaged in the company's business and in the conduct thereof, making such assault.' And again: 'Some of the courts seem at one time to have been inclined to hold that a master could not be held liable for the willful torts of his servant, because, it was said, if the servant through anger or malice committed an assault upon a person, he ceased for the time being to occupy the position of servant, and acted independently; that, inasmuch as he was not authorized to commit an assault, he did not represent the master in that act, but acted as an individual, the master therefore being not liable either in case or in trespass. This argument has long since been exploded. The theory that one may be a servant one minute, and the very next minute get angry, commit an assault, and in that act be not a servant, was too refined a distinction.' In *Western & Atlantic Railroad v. Turner*, 72 Ga. 292, 53 Am. Rep. 842, it was held that, when a conductor maliciously assaulted one who was treating with him for passage, he was acting in the prosecution and scope of the company's busi-

ness, and it was liable. And see *Turner v. Atlantic Railroad*, 69 Ga. 827. In *Peoples v. Brunswick & Albany R. Co.*, 60 Ga. 282, where a declaration alleged that a conductor called a passenger out of the train of which he had charge and beat him, it was held to set out a cause of action, and was not subject to a general demurrer. In *Craker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 510, it was said: 'If one hire out his dog to guard sheep against wolves, and the dog sleeps while the wolf makes away with a sheep, the owner is liable; but, if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*.' In *Gasway v. Atlanta & West Point R. Co.*, 58 Ga. 216, a railroad company was held liable for a willful tort of a baggage master and conductor committed upon one who was seeking to have his baggage checked. The trial judge charged to the effect that unless the act of the defendant's agent tended to facilitate or promote the business for which the agent was employed, the company was not responsible, and refused to charge to the effect that the principal is responsible for the acts of its agents within the range of their employment. This court said: 'Railroad companies are responsible to passengers for the torts of the conductors and other servants of the company employed in running trains when such torts are committed in connection with the business intrusted to such servants and spring from or grow immediately out of such business.' This case has been often cited, but never reversed. In *Haehl v. Wabash Ry. Co.*, 119 Mo. 325, 24 S. W. Rep. 737, where a bridge watchman willfully struck and shot a trespasser on the bridge, it was held to be an act in the scope of his employment, and that the company was liable. In *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, it was held that a railroad corporation was responsible for an assault and battery by its conductor upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. In the opinion, Gray, J., said: 'If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent. The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares.' In *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, 266, Willes, J., though using at one place the expression, 'in the course of his master's business and for his master's benefit,' evidently meaning merely in the discharge of the business intrusted to him, said (page 266): 'It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the busi-

ness which it was the act of the master to place him in.' See, also, *Daniel v. Petersburg R. Co.*, 117 N. Car. 592, 23 S. E. Rep. 327, 4 L. R. A. (N. S.) 485; *Texas Pacific Ry. Co. v. Williams*, 62 Fed. Rep. 440, 10 C. C. A. 463; *Cole v. Atlanta & West Point R. Co.*, 103 Ga. 474, 31 S. E. Rep. 107; *Savannah Street R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. Rep. 307, 22 Am. St. Rep. 464; *Patterson's Ry. Ac. L.* 105; *Higgins v. Southern Ry. Co.*, 98 Ga. 751, 25 S. E. Rep. 837; *Southern Ry. Co. v. Chambers*, 126 Ga. 404, 55 S. E. Rep. 37; *Georgia R. Co. v. Richmond*, 98 Ga. 495, 25 S. E. Rep. 565.

It is contended that there is a difference between an assault on a passenger, to whom the company owes a duty of protection, and a willful assault upon a stranger or mere passer having no relation with the company, and that the company is not liable for the latter. Cases of willful assaults by an employee upon a mere stranger are not in point. The petition alleges that the conductor did not shoot at the woman killed. He shot at the passenger, and, missing him, hit the woman. Moreover, a railroad company's liability for the willful torts of its agents acting in the scope of their business is not limited to torts on passengers. Some of the cases cited are based on torts to trespassers and persons not passengers. What we think we have demonstrated is that, under the allegations of the petition, the conductor in dealing with the passenger and shooting at him was acting in the prosecution and scope of the business entrusted to him, within the meaning of the law. If he had hit the passenger, there could be no doubt that the shooting would have been within the rule. If he missed the passenger, did the shooting cease to be within the scope of his business? Shooting at another does not fall within or without the scope of the agent's employment according as his aim is good or bad. Bad marksmanship does not alter the status of the agent doing the shooting. If, then, the conduct of the conductor within the car was in law the conduct of the company, why was not the result of that same conduct, taking effect outside the car, also the result of the conduct of the company? It is not easy to see. But it is contended that, although there was an unlawful or negligent act relatively to the passenger, there was no violation of duty toward a passer on the street, and therefore no liability, although she was struck. It is a mistake to say that there was no duty to passers on a public highway not to do wrongful or negligent acts which would naturally tend to injure them. In *Fletcher v. Baltimore & Potomac Railroad*, 168 U. S. 135, 18 Sup. Ct. Rep. 35, 42 L. Ed. 411, it was said: 'A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street,

where such act could have been prevented by the exercise of reasonable diligence on the part of the company.' In that case wood was thrown from a repair train by hands returning from work, and caused injury to one on the highway. The hands were not then engaged in the performance of their duties, but it was shown that the practice by the men of collecting refuse timber for firewood and throwing it off along the line near their homes had been going on for some time, and that the company was charged with notice of it, and acquiesced in it, or at least it was a question for the jury, and that it was also for them to say whether the company exercised due care to prohibit the custom and prevent the performance of the act. A single act of this kind by a passenger, or an employee outside the scope of his business, would not suffice to charge the company, unless it had reason to anticipate the dangerous act and failed to use proper diligence to prevent it. But where the act is done by the agent of the company in the scope of his employment, and while prosecuting it for the company, the single act is the company's act."

VALIDITY OF STATUTES CONFERRING EXECUTIVE AND LEGISLATIVE POWERS ON COURTS AND JUDGES.

By reason of the failure of the members of the executive and legislative departments of governments to perform their duties, or to perform them satisfactorily or in an unbiased manner, there has been a decided tendency in the legislation of the last quarter century, or even before that time, to confer executive powers upon courts and judges. The validity of these statutes has frequently been questioned. They are all a testimony to the efficiency and trustworthiness of our courts.

Perhaps I may be pardoned in giving some illustrations from my own state of Indiana, which are no doubt duplicated in many other states. Thus the judges of our circuit courts are empowered to take acknowledgments of the execution of deeds, solemnize marriages, certify to the qualifications of a notary public, appoint trustees of saving banks, appoint two members of the county board of tax reviewers, appoint (formerly) city commissioners to assess benefits and damages on the opening of new streets, and appoint (formerly) a board of city park commissioners.

Upon petition the circuit court is empowered to order the construction of ditches and of gravel roads, and, in a measure, superintend their construction, to entertain appeals (formerly) from boards of county commissioners to incorporate towns or to annex territory to cities or towns, to hear petitions for the reassessment of the cost of street improvements, to assent to conveyances by infant married women, and to enable persons whose wives are insane to convey real estate.

The usual ground of attack upon statutes of the character of such as these is, that the power conferred upon the courts is an executive or legislative one, belonging to the executive or legislative branches of the government, and consequently a violation of that clause usually inserted in the constitution that the powers conferred upon one branch of government shall not be conferred by the legislature upon another branch. Whether or not such a clause is inserted in the constitution, the separation by that instrument of the government of a state into three departments is usually construed to establish the proposition that one department can not be empowered to perform the duties of another. This interpretation and this clause of the constitution are also regarded as a protection from the legislative department from an encroachment upon the two other departments, and especially to protect the judicial department (the weakest of the three) from a deprivation of its powers or the overburdening it with executive duties to the impairment of its powers to perform its legitimate functions.¹

A distinction is drawn in many of the cases between power conferred upon the judge to perform a non-judicial act and the power conferred upon a court, as such, to perform a similar act. In the former line of cases it is considered that the legislature has selected the judge not in his judicial capacity to perform the executive act, and that in so performing it he is not acting judicially. This distinction was very clearly made in early cases by judges of the United States Supreme, Circuit and District Courts, as will be seen by a review of the cases. Congress passed a law at an early date to provide for the pension of widows and orphans barred by the statute

of limitations, and to regulate their claim to invalid pensions. This act required of the judges of District Courts of the United States to perform certain acts with reference to examination of claimants of the right to pensions. On April 5, 1791, Chief Justice Jay and Justice Duane of the District Court of New York gave an opinion upon the validity of this act. The substance of this opinion is (1) that one department of the government should not encroach upon another, and it is the duty of the latter to oppose such encroachments; (2) that neither the legislative nor the executive departments can assign to the judicial, any duty except such as is properly judicial and to be performed in a judicial manner; (3) that the duties assigned by this Act of Congress are not of that description, and it does not contemplate them as such, inasmuch as it subjects the decisions of the courts made pursuant to those duties, first to the consideration of the Secretary of War, and then to revision of the legislature, whenever, by the constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of the court; (4) that as the business assigned to the court by this act was not judicial nor directed to be performed judicially, the act could only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal descriptions; (5) that the judges regarded themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or to decline the office; (6) that they would accept the office; (7) that as congress had the power to extend the term of court for any length of time, the extension of the term by this act ought to be observed punctually; and (8) that the judges would regularly adjourn court from day to day, and between the adjournments proceed as commissioners to execute the business of this act in the same court room or chamber.²

On April 18, 1792, Justices Wilson and Blair of the Supreme Court of the United States, and Judge Peters of the District Court of Pennsylvania, addressed a letter to President Washington concerning the same act, declining to proceed under it for the reasons, (1) that the act is not of a judicial

¹ Fairview v. Giffen, 73 Ohio St. 183, 76 N. E. Rep. 565.

² Note to Rayburn's Case, 2 Dall. 409.

nature, forms no part of the power vested in the courts of the United States, and consequently the court must proceed without constitutional authority; (2) and because its judgment would be subject to the revision by congress or an executive authority. "Such control and revision we deem radically inconsistent with the independence of that judicial power which is vested in the courts, and consequently, with the important principle which is so strictly observed by the Constitution of the United States."³

Justice Iredell and Judge Sitgreaves of the District Circuit Court for the District of North Carolina, addressed a similar letter to President Washington on June 8, 1792, giving similar reasons why the Act is invalid.⁴ The validity of this Act came before the Supreme Court of the United States, was argued, but, as congress shortly after repealed it, no opinion was ever rendered.⁵ However, this repealed statute had in it a clause saving the rights of claimants whose claims had been passed upon; and this clause gave rise to the case of Yale Todd in 1794, wherein it was held, although no opinion was filed, that the Act was invalid, for the reasons assigned in the opinions of the several judges referred to.⁶

In 1851 the validity of an Act of congress concerning claims arising under the Treaty with Spain of 1812 was drawn in question. By the terms of that treaty the United States agreed to "cause satisfaction to be made for injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Congress passed an Act to carry this provision into effect, and authorized the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within

their respective jurisdictions, agreeably to the provisions of the treaty above quoted; and also provided "that, in all cases where the judges shall decide in favor of the claimants, the decisions, with the evidence upon which they are founded, shall be by said judges reported to the Secretary of the Treasury, who, upon being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."⁷

In a lengthy opinion the supreme court held that the duties imposed upon the judges of the Florida courts were not judicial; that they were merely commissioners to receive claims under the treaty and report them, with the evidence, to the Secretary of War; that the proceedings were *ex parte*, the District Attorney having no right to appear in opposition thereto; and that no appeal lay from the decisions of such judges, because of the non-judicial character of their proceedings. No opinion was given touching the validity of the Act, although it was incidentally referred to.⁸

These cases were reviewed in one of the Interstate Commerce cases; and it was said that the invalidity of the statute was placed chiefly upon the ground that the findings of the courts or judges were merely advisory to the Secretary of the Treasury, who could adopt or reject the results of their labors, and, therefore, as the courts could not enforce their decrees (as it were), the duty imposed upon them was not of the character of judicial duties.⁹

The Interstate Commerce Act provided that, upon application to a Circuit Court of the United States, that court might compel recalcitrant witnesses to attend before it; and, if they refused to testify, with or without assigning reasons for their action, the court might compel them to do so, in a proper case, and pass upon the sufficiency of any excuses they might urge in behalf of their refusal. It was

³ Note to Hayburn's Case, 2 Dall. 409.

⁴ Note to Hayburn's Case, 2 Dall. 409.

⁵ Hayburn's Case, 2 Dall. 409.

⁶ United States v. Fureira, 13 How. 40. The case of *Rees v. Town of Watertown*, 19 Wall. 107, although sometimes cited as an authority on the subject under discussion, is not in point. It simply decides that a court of equity can not order its marshal to levy a tax upon a resisting municipality to satisfy a judgment where the court, by writs of *mandamus*, has not been able to compel the municipal authorities to levy such tax.

⁷ 3 Stat. at Large, 768.

⁸ United States v. Fureira, 13 How. 40.

⁹ The supreme court has held that appeals from the court of claims, in certain instances, did not lie to it, for the reason that the judgments of the court of claims were merely of an advisory character for the consideration of congress, which that body might adopt or reject at its pleasure. *Gordon v. United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222, 13 Sup. Ct. Rep. 577.

most earnestly urged that this statute was void, because it imposed duties upon the court of a non-judicial character. But the court held otherwise, and declared that the proceedings were of a judicial character, of such a character as resulted in judgments determining, if necessary, that the witnesses should attend, and, if contested, whether or not the testimony sought to be elicited from them was proper.¹⁰

In New York a somewhat similar section in a statute was held valid. In substance the statute provided that, upon application of the attorney-general, a justice of the supreme court should grant an order for an examination before him, or a referee appointed by him, of a person whose testimony the attorney-general considered necessary to prepare his complaint, or prepare for trial of an action instituted by him under the Anti-monopoly Act of 1899. The duty thus imposed upon the justice was considered judicial, both in character and form, although the language used was mandatory on its face, as the justice had to exercise the judicial function of deciding whether the application was sufficient to make out a case under the statute, and because the object of the Act was to secure testimony relative to its violation.¹¹

A statute of the United States provided that in a smuggling case, after final decree, a party claiming to be the original informer could file a petition in the court that tried the case, praying for a certificate from the court as to the value of his service, for the information of the Secretary of the Treasury. The certificate was not binding upon that officer. The statute was practically held void, for it imposed upon the court non-judicial duties;

but the court placed its decision upon the ground that it had no jurisdiction.¹²

It may be noted that, in a number of cases cited, a petition to put the court in motion was necessary; and, before the court could act, it must in some way determine whether or not the allegations set forth in the petition were sufficient and true. The determination of these two facts, it was considered, called into action judicial powers or functions; and, therefore, the statute questioned could not be deemed invalid as requiring of the court executive duties. The question at issue was whether or not the duty enjoined upon the court or judge was executive or judicial; if the former, the statute was void; if the latter, valid. Thus a statute allowing a change of name to be made by a court, upon showing certain facts to it by petition and evidence, was held valid.¹³

So a statute authorizing a court to find whether a system of drainage, proposed by the drainage commissioners, is practicable, conducive to the public welfare, and will increase the value of the lands sought to be assessed, is valid; for the court does not propose the system, but acts upon the system adopted by the drainage commissioners, and determines whether the proposed use of the land sought to be taken is a public one or not. That, it is said, is a judicial question.¹⁴ A like decision was made in the case of the appointment of commissioners to lay out a highway, where the court had to pass upon the sufficiency of a petition for its location before making the appointment.¹⁵

A statute, giving the United States court the power to determine whether a Chinaman had the right to enter this country, upon

¹⁰ *Interstate Commerce Commission v. Brunson*, 154 U. S. 447, 14 Sup. Ct. Rep. 1125, reversing 53 Fed. Rep. 576; *In re Railway Commission*, 32 Fed. Rep. 241, is necessarily overruled by the decision of the supreme court. It has also been held that the statute authorizing clerks and judges to issue subpoenas in matters of pension claims, upon application of the commissioner of pensions, was valid. *In re Gross*, 78 Fed. Rep. 107. And also that it was not valid. *In re McLean*, 37 Fed. Rep. 648.

¹¹ *In re Davies*, 168 N. Y. 89, 61 N. E. Rep. 118, 32 Civ. Proc. Rep. 163. See *Orders*, 47 N. Y. Supp. 20, 21 Misc. Rep. 101, 47 N. Y. Supp. 883, 22 Misc. Rep. 285. *People v. Nussbaum*, 66 N. Y. Supp. 129, 32 Misc. Rep. 1, is in accord with *In re Davies*, *supra*, but it was reversed in 67 N. Y. Supp. 492, 55 App. Div. 245.

¹² *Ex parte Gans*, 17 Fed. Rep. 471; *United States v. Queen*, 105 Fed. Rep. 269; *Ex parte Riebling*, 70 Fed. Rep. 310.

¹³ *In re La Societe Francaise, D'Eparques*, 123 Cal. 525, 56 Pac. Rep. 458, 787.

¹⁴ *State v. Superior Court*, 42 Wash. 491, 85 Pac. Rep. 264.

¹⁵ *Citizens' Savings Bank v. Greenburgh*, 173 N. Y. 215, 65 N. E. Rep. 798, affirming 65 N. Y. Supp. 554, 31 Misc. Rep. 428. A statute relating to the improvement of roads, providing that on appeal from the assessment of benefits and damages, the clerk of the county board should transmit the record to the judge of the superior court, who should "file the transcript and docket the case," is valid; for it does not impose upon him a non-judicial public employment, but merely requires him to direct the filing of the transcript and the docketing of the case. *Senor v. Board*, 13 Wash. 48, 42 Pac. Rep. 552.

petition presented to it, is valid; for it calls into exercise judicial powers.¹⁶

Upon the validity of statutes for the incorporation of towns, or the annexation of territory to a city or town, either by application to a court, or by application to a municipal board and appeal therefrom to the court, the cases are divided. In many such cases such statutes have been held valid.¹⁷ But there are also a number of decisions that they are unconstitutional.¹⁸

Upon the question of the power to confer upon courts the right to disannex territory from a town or a city, where the matter is presented to them by a prescribed petition, or upon appeal from some executive board, the courts are divided. In one line of cases such a statute is valid, where certain facts must be found to exist before the disannexation can be decreed.¹⁹ But here, also, there are decisions that the attempt to confer such powers upon the court is futile.²⁰

Where the statute conferred upon the judge of a county court and two judges of a circuit court, as a board of commissioners, power to determine what territory should be

embraced within a sanitary district, and after they had established the district, it was held that their action could not be collaterally attacked; but the court went further and held the statute, on this point valid.²¹

A like ruling was made on a statute authorizing a court to establish county boundaries.²²

The constitution of California provided that the judicial power should be vested in supreme, district and county courts, in justices of the peace, and in such municipal and inferior courts as the legislature may deem necessary and establish.

The legislature established a police court for the city of San Francisco, and, subsequently, provided that the judge of this court should be a member of the board of police commissioners for the city, which was empowered to appoint or select policemen. These commissioners necessarily exercised executive powers. It was claimed that the act making the judge of the police court a police commissioner was unconstitutional; but the court held otherwise, and thereby overruled a long line of cases. It was considered that, as the police court was purely a legislative court, there was no reason why the legislature could not impose upon the judge executive duties.²³

¹⁶ *Fong Yue Ting v. United States*, 149 U. S. 698, 728, 13 Sup. Ct. Rep. 1016.

¹⁷ *Ford v. Des Moines*, 80 Iowa, 626, 45 N. W. Rep. 1031; *In re Union Mines*, 39 W. Va. 179; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. Rep. 813; *Elder v. Central City*, 40 W. Va. 222; *Burlington v. Leebrecht*, 43 Iowa, 252; *Forsyth v. Hammond*, 68 Fed. Rep. 774, 18 C. C. A. 175; *Keyser v. Trustees*, 16 Mo. 88; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. Rep. 1112; *Lewis v. Brandenburg* (Ky.), 47 S. W. Rep. 862; *Eskridge v. Emporia*, 63 Kan. 368, 65 Pac. Rep. 694; *Nash v. Fries* (Wis.), 108 N. W. Rep. 210; *Callen v. Junction City*, 43 Kan. 627, 23 Pac. Rep. 652, 7 L. R. A. 736; *Winfield v. Lynn* (Kan.), 57 Pac. Rep. 549.

¹⁸ *Galesburg v. Hawkins*, 75 Ill. 156; *People v. Nevada*, 6 Cal. 143; *Shumway v. Bennett*, 29 Mich. 451; *State v. Simmons*, 32 Minn. 540; *In re North Milwaukee*, 93 Wis. 616, 67 N. W. Rep. 1033. In an article as brief as this one must be, it is impossible to analyze the statutes upon which each particular decision is based. The practitioner must do that for himself in his own case; but upon a careful analysis it will be found that what one court considered a statute calling for the exercise of judicial power, because of the detail of facts that must be found to exist before a town could be incorporated or territory annexed to a city or town, another court considered a like statute to call for only the exercise of executive, or even, if you please, legislative power. On principle these decisions can not be reconciled.

¹⁹ *Edgewater v. Liebhart*, 32 Colo. 397, 76 Pac. Rep. 366; *Glaspell v. Jamestown*, 11 N. Dak. 86, 88 N. W. Rep. 1023; *Fairfield v. Guffee*, 73 Ohio St. 183, 76 N. E. Rep. 865.

²⁰ *Young v. Salt Lake City*, 24 Utah, 321, 67 Pac. Rep. 1066.

²¹ *People v. Nelson*, 133 Ill. 565, 27 N. E. Rep. 217. The court quotes with approval the following from *Field v. People*, 2 Scam. 79, referring to the provision of the constitution that powers conferred upon one department of government shall not be exercised by another: "It does not mean that the legislative, executive and judicial powers should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but the true meaning, both in theory and practice, is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many. That this is the sense in which this maxim was understood by the authors of our government, and those of the general and state governments, is evidenced by the constitutions of all. In every one there is a theoretical or practical recognition of this maxim, and at the same time a blending and admixture of different powers."

²² *Kaufman v. McGaughey*, 11 Tex. Civ. App. 551, 33 S. W. Rep. 1020.

²³ *People v. Provines*, 34 Cal. 520. The cases overruled are *Burgoyne v. Board*, 5 Cal. 19; *Exline v. Smith*, 5 Cal. 112; *Dickey v. Hurlburt*, 5 Cal. 343; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; *Phelan v. San Francisco*, 6 Cal. 531; *People v. Heston*, 6 Cal. 679; and *Sanderson's Case*, 30 Cal. 160. A review of these overruled cases will not be uninteresting. In *Burgoyne v. Board*, 5 Cal. 19, the court of sessions was invested with power partly legislative, executive

The decision in this case turned upon a sharp construction of that clause of the constitution of that state, wherein it provides that no person employed in one shall be employed in either of the other two departments of the state government, as expressly defined and limited in that instrument. That clause was construed to mean that no member of the legislative department, as in the constitution defined, should at the same time be a member of the executive or judicial departments as therein defined, and vice versa. "That is to say, no judicial officer shall be governor, lieutenant-governor, secretary of state, comptroller, attorney-general, or surveyor-general all of whom, and none others, in the sense of the third Article of the Constitution, belonged to and constitute the executive department of the government; or a member of the senate or assembly, which two bodies, and none others, in the sense of the third Article of the constitution, constitute the legislative department. So of each officer of the executive department—he cannot belong to the judicial or legislative departments. That is to say, he can hold no judicial office, nor the office of senator or member of the

and judicial, and in the exercise of this power ordered the county auditor to draw a warrant to pay for a lot which had been purchased by its order made in the exercise of its executive functions. The warrant was held void for the reason that the court, being a part of the judicial department of the state government, was prohibited from exercising executive functions. In *Exline v. Smith*, 5 Cal. 112, a rule of court was involved which specified that a waiver of trial by jury should take place in instances not provided by the statute. It was held that the adoption of this rule was the exercise of legislative power. In *Dickey v. Hurlburt*, 5 Cal. 343, the designation by the judge of the court of the place and manner of holding a county seat election was held invalid. In *Tuolumne County v. Stanislaus County*, 6 Cal. 440, the doctrine of *Burgoyne's Case* was adhered to, and the statute questioned was held valid. The statute attacked required the county judges of those two counties to appoint commissioners to ascertain and settle certain matters of indebtedness between the two counties; but the court held that the act of appointment was of the same functional character as the appointment of arbitrators and referees, and therefore judicial. The case of *Phelan v. San Francisco*, 6 Cal. 531, was founded upon facts similar to those in the *Burgoyne Case*. In *People v. Hesten*, 6 Cal. 679, a statute authorized a court to issue a writ of *certiorari* to review the proceedings of a board of supervisors of a county in assessing a tax. It was claimed that the tax was void. The statute authorizing the issuance of the *certiorari* was held void. In *Sanderson's Case*, 30 Cal. 160, it was held that the chief justice of the supreme court could not hold the office and perform the duties of a trustee of the state library.

assembly. And so of senators and members of the assembly—they can hold no judicial or executive offices comprised in the executive and judicial departments as defined" in the constitution. "In short, the third Article of the Constitution means that the powers of state government, not the local governments thereafter to be created by the legislature, shall be divided into three departments, and that the members of one department shall have no part in the management of the affairs of either of the other departments, except in the cases hereinafter expressly directed or permitted." As thus construed, it was considered that this prohibitory clause of the constitution did not apply to the judge of the police court, for he was not a member of the state government, as defined by the constitution. The same ruling, in the appointment of police commissioner, was made with reference to district judges.²⁴

By a statute of Kansas application for the purchase of school lands had to be made to the probate court of the county, and the judge of this court heard this application and took such steps as resulted, in a proper instance, in a sale of the land. The statute was held valid. "There is no prohibition in the constitution or elsewhere against the exercise of such jurisdiction by the probate courts. There is no inconsistency between the exercise of this jurisdiction and the performance of any other duty that may rightly be conferred upon probate courts. And the probate courts or the judges thereof may exercise this jurisdiction as consistently with the performance of their other duties, as they may take the acknowledgment of deeds, or solemnize marriages. This is a jurisdiction which has not been placed anywhere else, either by the constitution or the statute, and we certainly think the probate courts, or the judges thereof, may exercise it if they choose. This is not the first jurisdiction or power which has been conferred upon the probate courts or probate judges, aside from the ordinary powers or jurisdiction authorized by the constitution." "The legislature undoubtedly intended to confer said jurisdiction upon the

²⁴ *Staudt v. Board*, 61 Cal. 313. A writ of *certiorari* does not lie to a judge appointing a member of the board of supervisors, for it is a ministerial act. *People v. Bush*, 40 Cal. 344. The same rule as to service by *certiorari* was held with reference to the granting of a ferry license. *Chard v. Harrison*, 7 Cal. 113.

persons who exercise the jurisdiction of the probate courts, and not upon the courts themselves as probate courts. With this literal construction said sections are valid, so far as they apply to this case. But as the legislature has designated the persons whom they intended shall exercise this jurisdiction as 'probate courts,' it will be proper for such persons to carry on all the proceedings connected with such jurisdiction in the name of the probate courts."²⁵

The constitution of Missouri (in 1880) prohibited the exercise, by any department of the government, of any power belonging to another department, except "such other business as may be prescribed by law." This quoted clause was held to include "such duties pertaining to judicial business as the legislature may deem it necessary for the judge to perform with a view to the efficient administration of justice, or for the protection of litigants and others who are to be affected by legal proceedings." Consequently, a statute requiring the judge of the Circuit Court of St. Louis, as a board, to receive fees and to award the publication of advertisements, judicial notices and orders of publication required by law to be made, to the newspaper making the lowest bid, was constitutional.²⁶

A statute providing that the courts may direct the manner in which notice shall be given to common carriers of proceedings by the railway commission of the state has been held valid.²⁷

²⁵ *In re Johnson*, 12 Kan. 102. "It may be conceded that it would be more logical and less objectionable to say that the legislature may create an office with specified duties, and then make the person holding the position of probate judge the incumbent of such office, than to hold that certain duties may be cast directly upon the person holding the office of probate judge. But substance is above form." In this state it was held that a statute authorizing the judge of the probate court to issue a permit to sell intoxicating liquors or medicine was valid. *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284. In this same state it was held that the failure of the probate judge to examine and count the funds in the hands of his county treasurer, as a statute required, was not a forfeiture of his office as probate judge, for such a duty is distinct from his judicial duties, and in the nature of a new office. *State v. Brown*, 35 Kan. 167, 10 Pac. Rep. 594. As to the probate judge appointing a county auditor, see 2 Kan. Law J. 39-57.

²⁶ *State v. Tolle*, 71 Mo. 645.

²⁷ *State v. Adams Express Co.*, 66 Minn. 271, 68 N. W. Rep. 1085.

A statute authorizing, through the medium of the courts, the establishment of ditches has been held valid also.²⁸

So has one to appoint a referee to examine and report to the court on claims of a city.²⁹

So has a statute providing a special tribunal to hear contested election cases, to be presided over by a judge of the superior court.³⁰

A statute empowering a court, upon proper petition, to abolish grade crossings over a railroad track, through commissioners appointed by it, is valid.³¹ So is one enabling the court to order the use of gates at a railroad crossing.³²

A statute empowering a probate court, where a city and a telephone company cannot agree as to the mode a telephone line shall be installed in such city, to determine the question, has been held valid.³³

Attempts have been made to authorize courts to fix the compensation of officers or public service companies, but usually unsuccessfully. Thus a statute authorizing the court to appoint its own reporter and fix his salary has been held invalid.³⁴ And the same decision was made where the court was required to fix the salary of a county surveyor.³⁵ But in California, where the appointment of a court reporter, and fixing his compensation, was held invalid, a statute requiring the court to certify to the amount due a court reporter, which amount was then paid out of the county treasury, was held valid, the act of certifying not being the exercise of legislative power.³⁶ Yet a statute re-

²⁸ *State v. Crosby*, 92 Minn. 176, 99 N. W. Rep. 636.

²⁹ *Guthrie v. New Vienna Bank (Okla.)*, 38 Pac. Rep. 4.

³⁰ *Johnson v. Jackson*, 90 Ga. 389, 27 S. E. Rep. 734.

³¹ *Lancy v. Boston*, 186 Mass. 128, 71 S. E. Rep. 302.

³² *Inhabitants of Palmyra Tp. v. Pennsylvania R. Co. (N. J.)*, 50 Atl. Rep. 369, affirming 63 N. J. Eq. 799, 52 Atl. Rep. 1132; *Exkert v. Perth Amboy*, etc., L. Co., 65 N. J. Eq. 777, 57 Atl. Rep. 438.

³³ *Zanesville v. Zanesville, etc., Company*, 64 Ohio St. 67, 59 N. E. Rep. 781, 52 L. R. A. 150, 10 O. C. D. 783; *Queen City Telephone Co. v. Cincinnati*, 27 Ohio Cir. Ct. Rep. 385. *Contra*. *New York, etc., Co. v. Bound Brook (N. J.)*, 48 Atl. Rep. 1022.

³⁴ *Smith v. Strother*, 68 Cal. 194, 8 Pac. Rep. 453; *People v. Rumsey*, 64 Ill. 44.

³⁵ *State v. Rogers*, 71 Ohio St. 203, 73 N. E. Rep. 461. But in other states like statutes have been held valid. *Stone v. Wilson*, 19 Ky. 126, 39 S. W. Rep. 49, overruling *Com. v. Adams*, 95 Ky. 588, 26 S. W. Rep. 581; *Staples v. Liano Co.*, 9 Tex. Civ. App. 201, 28 S. W. Rep. 560.

³⁶ *Stevens v. Truman*, 127 Cal. 155, 59 Pac. Rep. 397.

quiring the judge to approve a coroner's claim has been held valid.³⁷

So a statute authorizing two judges of a court, upon petition to it by a customer, to fix a water rate for him with a public water company, was held valid.³⁸ The court is careful to distinguish the case from an instance requiring it to fix the rate generally for all consumers of the city evidently inclining to the opinion that such a statute would be of doubtful validity.

But in Nebraska it has been distinctly held that a court cannot be empowered to determine what compensation a telephone company may exact for service to be rendered the public, for such a power is a legislative one and not a judicial one.³⁹ Nor can the court make such arrangements for the business intercourse of common carriers as, in its opinion, they ought to make for themselves.⁴⁰

Let us turn to some cases where courts or judges are required to appoint purely ministerial officers.

In Georgia an act, making it the duty of the judge of superior court of the county, the judge of the city court of a city in the county, and the ordinary courts of the same county, to appoint three freeholders as a board of registration and election managers for the city, was held valid.⁴¹

In Illinois the appointment of park commissioners by the Circuit Court of Cook County was held valid.⁴²

In Kentucky it has been held that an act authorizing the county judge to appoint a collector of back taxes for his county was an appointment by him as judge and not as a

court, and no memorandum of the appointment need be entered in the order book of the court; and once made could not be revoked.⁴³

In an earlier case it had been held that a statute authorizing the presiding judge and justice of a county court to elect commissioners of common schools was valid, and not prohibited by the constitution.⁴⁴

In New York an act authorizing the county judge, upon application of twelve freeholders, to appoint, under his hand and seal, three freeholders to be commissioners to carry into effect the purposes of the act, was held to direct the exercise of judicial and not executive powers; but, inasmuch as the statute was invalid, because it attempted to confer unconstitutional power upon a city to donate money to a railway corporation, the judge was prohibited making the appointment.⁴⁵

In Ohio a statute authorizing the judges of the Superior Court of Cincinnati to appoint, upon petition of the city solicitor, five trustees of the Cincinnati Southern Railway, to which railway that city had made a large donation, was held valid. The appointment had to be entered upon the order book of the court; and it was said to be a judicial act.⁴⁶

The Constitution of West Virginia provides that the governor of the state shall appoint, with the advice and consent of the senate, all officers established by it or shall be created by law, and whose election or appointment is not otherwise provided for. It also provides that the legislature shall not confer upon any court or judge the power of appointment to office further than the same is therein provided for. Another provision declares that the legislature, in cases not provided for in such constitution shall prescribe by general laws the terms of office, powers, duties, and compensations of all public officers and agents, and the manner in which they shall be elected, appointed and removed.

³⁷ Locke v. Speed, 62 Mich. 408, 38 N. W. Rep. 917.

³⁸ Janvrin v. Revere Water Co., 174 Mass. 514, 55 N. E. Rep. 381.

³⁹ Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. Rep. 171. "It is not the function of this court to establish a schedule of rates." Reagan v. Trust Co., 154 U. S. 362-400, 13 Sup. Ct. Rep. 1047-1055, 38 L. Ed. 1014-1024.

⁴⁰ State v. Sioux City, etc., R. Co., 46 Neb. 682, 65 N. W. Rep. 766.

⁴¹ Russell v. Cooley, 69 Ga. 215. The opinion contains a review of the many instances where the courts of that state have performed other than judicial functions. The court reviews somewhat the eccentric case of Bealls v. Bealls, 8 Ga. 211.

⁴² People v. Morgan, 90 Ill. 558. The case contains a review of legislation concerning the exercise of quasi judicial functions by courts. Cornell v. People, 107 Ill. 372. In People v. Williams, 51 Ill. 65, was drawn somewhat in question the appointment of assessors to assess benefits to lots resulting from a municipal improvement. Ross v. Board (N. J.), 55 Atl. Rep. 310.

⁴³ Hoke v. Field, 10 Bush, 144, 19 Am. Rep. 58.

⁴⁴ Johnson v. De Hart, 9 Bush, 640. In Taylor v. Commonwealth, 3 J. J. Mar. 401, it is held that a court cannot appoint a person to fill a vacancy in the office of its clerk, but the case turns upon the fact that there was no vacancy. Incidentally the court holds that no appeal would lie from an act of appointment, for its act is the exercise of executive powers.

⁴⁵ Sweet v. Hulbert, 51 Barb. 312.

⁴⁶ Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

An act created the office of jury commissioners, for a term of four years, and authorized the circuit court or judge thereof in vacation to appoint them; and this act was valid.⁴⁷

So a statute authorizing a probate judge to appoint commissioners to exercise complete supervision over the police of a city, to the extent of preferring charges against them for such acts as would justify their removal, has been held valid.⁴⁸ So is one authorizing the appointment of assessors to assess the damages and appraise the benefits occasioned by a public or semi-public work, even though the court had no control over its own appointees.⁴⁹ So a statute authorizing the court to appoint drainage commissioners.⁵⁰ And so is one authorizing a court to appoint the members of a board of children's guardians.⁵¹ And a like ruling has been made in the case of the appointment of election commissioners.⁵² And also of the appointment of a tax commissioner to investigate, as a member of a board, the appraisement of real estate for taxation purposes.⁵³

A statute requiring the grand jury to attend at every sitting of the court, unless the judge thereof filed an order directing differently, was held to be valid, his act being held a judicial and not a ministerial one.⁵⁴

Decisions upon cases of appointment, however, are not uniform. Thus in Massachusetts a statute authorizing the supreme court to appoint supervisors of election was held unconstitutional and void, because that duty is not a judicial function. "These supervisors, although entrusted with certain dis-

cretion in the performance of their duties, are strictly executive officers. They make no report or return to the court, or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of the opinion that the power of appointing such officers cannot be conferred upon justice of this court without violating the constitution of this commonwealth. We can not exercise this power as judges, because it is not a judicial function; nor as commissioners, because the constitution does not allow us to hold any such office."⁵⁵ So a statute authorizing a court to appoint excise commissioners was held invalid.⁵⁶ And so one to appoint a board of visitors to control the county jail.⁵⁷

Another view of this question was presented in Maryland. There the court appointed its "Crier." After the appointment of a particular crier was made, a statute was passed giving him charge and control of the court house and grounds. The constitution provided that the court might appoint its own officers. This act was held invalid, because it indirectly conferred upon the judge non-judicial functions, and interfered with the court by requiring its officer to discharge other duties than those pertaining to his office as crier.⁵⁸ In Iowa the power to appoint water works trustees, it was held, could not be conferred upon a court.⁵⁹ The same ruling was made in Michigan concerning the appointment of assessors of damages.⁶⁰

Where a statute left to the court the power to determine the necessity for additional court house accommodations, including the designation of the location of the building, and the determination of the amount that should be expended in its construction, it was held void, for the reason that it conferred execu-

⁴⁷ *State v. Mounts*, 36 W. Va. 179, 14 S. E. Rep. 407; *State v. Kendle*, 52 Ohio St. 346, 39 N. E. Rep. 947.

⁴⁸ *Fox v. McDonald*, 101 Ala. 51, 13 S. E. Rep. 416, 46 Am. St. Rep. 98.

⁴⁹ *People v. Williams*, 51 Ill. 63; *People v. Morgan*, 90 Ill. 558; *Terre Haute v. Evansville, etc.*, R. Co., 149 Ind. 174, 46 N. E. Rep. 77; 37 L. R. A. 174; *McGee v. Board*, 84 Minn. 472, 88 N. W. Rep. 6.

⁵⁰ *Moore v. People*, 106 Ill. 376; *Blake v. People*, 100 Ill. 504; *Kilgour v. Commissioners*, 111 Ill. 342; *Huston v. Clark*, 112 Ill. 344; *Owners of Lands v. People*, 113 Ill. 296.

⁵¹ *Wilkinson v. Board*, 158 Ind. 1, 62 N. E. Rep. 481.

⁵² *People v. Hoffman*, 116 Ill. 537, 5 N. E. Rep. 596, 8 N. E. Rep. 788; *Wetherill v. Devine*, 116 Ill. 631, 6 N. E. Rep. 24.

⁵³ *Board v. State*, 147 Ind. 476-492, 46 N. E. Rep. 908. The appointment was made by the judge of the circuit court. *State v. Thorne*, 112 Wis. 181, 87 N. W. Rep. 797, 55 L. R. A. 956; *Foster v. Rowe*, 128 Wis. 326, 107 N. W. Rep. 635.

⁵⁴ *Dinsmore v. State*, 61 Neb. 418, 85 N. W. Rep. 445.

⁵⁵ *Case of Supervisors of Election*, 114 Mass. 247, 19 Am. Rep. 341.

⁵⁶ *Schwarz v. Dover*, 68 N. J. L. 576, 53 Atl. Rep. 214.

⁵⁷ *Beasley v. Ridout*, 94 Md. 641, 52 Atl. Rep. 61. In *Re Janitor*, 35 Wis. 410, it was held that the supreme court could not be deprived of its right to appoint its own janitor and librarian.

⁵⁸ *Prince George Co. v. Mitchell*, 97 Md. 330, 55 Atl. Rep. 673.

⁵⁹ *State v. Barker (Iowa)*, 89 N. W. Rep. 204.

⁶⁰ *Hauseman v. Kent Circuit Court*, 58 Mich. 364, 25 N. W. Rep. 369.

tive powers that pertained to another department of the government.⁶¹

A statute giving probate judges power to consign drunkards to an asylum, but giving to such judges no real power over the person so consigned, was held void in Minnesota.⁶²

The right to confer upon courts the power to levy or to collect taxes, or manage the public funds, has been drawn into question several times.

In Ohio a statute conferring upon the judges of common pleas power concerning the revenues of their county was held valid. "Whether they could be compelled to perform the duties which the Act undertakes to require of them is foreign to the present inquiry. They admit they are in the exercise of the authority conferred by the Act. The question is, whether the authority which they thus exercise constitutes a distinct office, or is merely additional authority conferred upon them as judges. We have no hesitation in saying, that, in our opinion, the act does not create or invest them with a new office. What they are authorized to do they can only do by virtue of their office as judges. It does not follow, from the fact that new duties or powers might have constituted a new office, that, therefore, they do constitute a new office. New duties may as well be attached to an existing office, as that part of the duties of an existing office may be assigned to a new one."⁶³

But in Kentucky a statute requiring a state circuit court, on demand of certain bondholders, to levy a tax for the payment of their bonds, was held void, because it imposed upon a judicial tribunal legislative functions.⁶⁴

⁶¹ *Moreau v. Board*, 68 N. J. Eq. 480, 53 Atl. Rep. 208. Under a power to repair a court room, a court cannot practically reconstruct the court house by providing for new additions and extensions, and a new foundation, leaving but a small portion of the old walls as a nucleus around which repairs may be made. *Board v. Gwin*, 136 Ind. 562, 36 N. E. Rep. 287. A statute in an instance of the proposed removal of a county seat, requiring the petitioners to procure a deed of conveyance of a court house site, and plans and specifications for a court house, and to deliver them to the judge of the circuit court, and if he find them satisfactory to approve them, and make an entry of his approval on the records of his court, is valid. *Board v. State*, 147 Ind. 476, 46 N. E. Rep. 908.

⁶² *Foreman v. Hennepin County*, 64 Minn. 371, 67 S. W. Rep. 207.

⁶³ *State v. The Judges, etc.*, 21 Ohio St. 1.

⁶⁴ *Fleming v. Trowsdale*, 85 Fed. Rep. 189, 29 C. C. A. 106; *Fleming v. Dyer*, 20 Ky. 689, 47 S. W. Rep. 444.

And so Connecticut and Maryland statutes have been for like reason held void.⁶⁵

But a statute requiring a court to assess a tax, if it found certain facts to exist, has been held valid.⁶⁶

In Kansas a statute authorizing the supreme court to hear appeals from a board of county clerks in the appraisal of the property of railroads for purposes of taxation was held void; for the valuation of property for purposes of taxation was an incident to the taxing power, and for that reason not such a "judicial power" as could be conferred upon that court in the guise of appellate jurisdiction.⁶⁷

In Kentucky, under a statute, a precinct subscribed for stock in a railroad company, and the county judge was required to appoint a "collector of taxes for such precinct." He attempted but failed to find a collector. Upon application to the circuit court by a bank holding bonds issued by the precinct, issued in payment for the stock, a receiver was appointed to compel the taxpayers of the precinct to pay their taxes. "The judiciary," said the court, "has no power to levy taxes or to collect taxes when the officer appointed to collect refuses to do so; or, if no one is appointed to collect, the judiciary is powerless to supply the defect. Those are legislative duties, and when the department of government, to which those duties are confided, neglects to discharge them, neither the judicial nor executive departments of the government can execute such power. If, when the legislature fails to make proper laws, or to provide the means of collecting taxes imposed, the judiciary may intervene and perform such duties, there is an end to the theory of the powers belonging exclusively to each of the three departments of the government, and the necessity for keeping each within its sphere for its successful administration no longer exists."⁶⁸

⁶⁵ *Bradley v. New Haven*, 73 Conn. 646, 48 Atl. Rep. 960; *Baltimore v. Bonaparte*, 93 Md. 156, 48 Atl. Rep. 735.

⁶⁶ *Campbellsville, etc., Co. v. Hubbert*, 112 Fed. Rep. 718, 50 C. C. A. 435.

⁶⁷ *Auditor v. Atchison, etc., R. Co.*, 6 Kan. 500, 7 Am. Rep. 675; *Kansas Pacific, etc., Ry. Co. v. Ellis Co.*, 19 Kan. 584. The case of *Coleman v. Newby*, 7 Kan. 82, involved the validity of a rule of court limiting the right of appeal given by statute. It does not relate to the question under discussion, to which it is sometimes cited. So practically to same effect *People v. Bush*, 40 Cal. 344.

⁶⁸ *McLean County v. Deposit Bank*, 81 Ky. 255, citing *Rees v. Watertown*, 19 Wall. 107; *Barkley v. Levee*

In several cases it has been held that the statute empowering courts to issue licenses, upon finding certain facts concerning the applicant, was valid.⁶⁹

So a statute authorizing an appeal in such an instance has been held valid.⁷⁰

A statute requiring a court, upon presentation of a petition, to ascertain the number of signers thereof who voted at the last election for governor, and, if a certain percentage of the total voters at such election in that district had signed the petition, to order an election, was held unconstitutional.⁷¹

And so it was held concerning a statute requiring a court to divide a certain territory into election districts.⁷²

A statute requiring three of the Supreme Court Judges of North Dakota, with the governor, to give a certificate concerning their confidence in the trustworthiness of an orphan's home, was held valid.⁷³

And so was one in North Carolina requiring the judge of the court to supervise the office of his clerk.⁷⁴

In Georgia a statute making the judge of a city court ex-officio commissioner of roads and revenue was held valid.⁷⁵

A statute requiring a court to decide which of two sections of a previous act is valid, is an invalid statute, for it confers legislative power.⁷⁶ So is a statute, for a like reason, authorizing a court to "supercede, revoke and annul" a particular ordinance, upon the petition of ten taxpayers.⁷⁷

A statute requiring judges of the supreme court to prepare the syllabi of the opinions

they write is invalid, for it requires of them ministerial duties.⁷⁸

A statute may authorize the mayor of a city to hold a court and to punish offenders.⁷⁹ And so one may authorize him to hold the office of justice of the peace.⁸⁰

But a provision in a constitution authorizing the legislature to create courts does not authorize it to create courts of a legislative or executive character.⁸¹

W. W. THORNTON.

Indianapolis, Ind.

⁷⁸ *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. Rep. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107.

⁷⁹ *Waldo v. Wallace*, 12 Ind. 569.

⁸⁰ *Wides v. Morrill*, 22 Cal. 473; *Ex parte Guerrero*, 69 Cal. 88, 10 Pac. Rep. 261. Wherein a mayor can hold court, a provision of the constitution prohibiting a judicial officer from accepting an office during the term for which he was elected in either the legislative or executive departments applies to him. *Waldo v. Wallace*, 12 Ind. 569.

⁸¹ *Western U. T. Co. v. Myatt*, 98 Fed. Rep. 335. "To avoid misconception upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." *Murray's Lessee v. Hoboken, etc., Co.*, 18 How. 272, 284.

CONTRACTS—AGREEMENT TO COMPENSATE EXPERT WITNESS.

BURNETT v. FREEMAN.

Kansas City Court of Appeals, Mo., May 20, 1907. Rehearing Denied June 24, 1907.

A physician is not entitled to extra compensation for expert testimony given on behalf of a litigant, though he is not required to perform services for the party calling him, in addition to giving evidence, without additional compensation.

An agreement to pay a medical expert extra compensation for evidence, which was his duty to testify to under a subpoena, was invalid as against public policy, though the party employing him knew that it was his custom to charge extra for attendance as a witness in the line of his profession at the time he was subpoenaed.

ELLISON, J.: The plaintiff is a practicing physician in Kansas City. Freeman and his wife each sued the Metropolitan Street Railway Company for injuries alleged to have been suffered by the wife through the negligence of the servants of that company. The plaintiff was called as a witness in each of the cases in behalf of the plaintiff. He has brought the present action on a *quantum meruit*, in which he claims \$50 in each

Commissioners, 3 Otto, p. 258, and Pennington v. Woolfolk, 79 Ky. 13.

⁶⁹ *State v. Bates*, 96 Minn. 110, 104 N. W. Rep. 709; *State Board v. Roy*, 22 R. I. 538, 43 Atl. Rep. 802; *McCrea v. Roberts*, 89 Md. 238, 43 Atl. Rep. 39; *Moline v. Fairchild Co.*, 72 Conn. 1, 43 Atl. Rep. 485.

⁷⁰ *Thompson v. Koch*, 98 Ky. 400, 33 S. W. Rep. 96. See *Fay*, Petitioner, 15 Pick. 243.

⁷¹ *Board v. Todd*, 97 Md. 247, 54 Atl. Rep. 963.

⁷² *State v. Higgins*, 125 Mo. 364, 28 S. W. Rep. 638.

⁷³ *In re Kol*, 10 N. Dak. 493, 88 N. W. Rep. 273.

⁷⁴ *McDonald v. Morrow*, 119 N. Car. 666, 26 N. E. Rep. 132.

⁷⁵ *Phinzy v. Eve*, 108 Ga. 360, 33 S. E. Rep. 1007. A supreme court cannot convene the legislature, however great the emergency for its assembling. *French v. State Senate*, 146 Cal. 604, 80 Pac. Rep. 1031, 60 L. R. A. 556.

⁷⁶ *State v. Young*, 29 Minn. 474, 9 Pac. Rep. 737.

⁷⁷ *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

case for his services as an expert witness. He recovered judgment in the trial court.

The court, among other instructions, gave one that if the jury found "that plaintiff's services were of an expert character and required scientific knowledge, and that plaintiff in such cases charged more than the ordinary witness fee, and that defendants knew that, and caused plaintiff to give expert testimony, then defendants became liable to pay plaintiff the reasonable value of the services." On the other hand, the court refused instructions offered by defendants to the effect that plaintiff could not recover extra compensation above witness' fee for attending the court as a witness in the cases. Whether a physician could be allowed to charge for his services as a witness as an expert has been a question upon which the courts have entertained widely divergent views. In *Rogers on Expert Testimony*, 425, it is said that the cases in this country are nearly balanced, and that the question must be regarded as still an open one. Counsel have not cited a case from this state. Among those from other jurisdictions affirming his right to charge, and his right to refuse to testify, unless paid in addition to a mere witness' fee, are: *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 15; *People v. Montgomery*, 13 Abb. Prac. N. S. (N. Y.) 207; In the Matter of *Roelker*, 1 Sprague, 276. Fed. Cas. No. 11,995; *Webb v. Page*, 1 Carr. & Kirw. 23. And among text-writers affirming such right are: 1 *Taylor's Prin. of Med. Jurisprudence*, 19; 2 *Phillips. Ev.* 828; 1 *Redfield, Wills*, 154, 155, and note; 1 *Wharton, Ev.* §§ 380, 456. Among those entertaining the opposite view are: *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Dixon v. People*, 168 Ill. 189, 48 N. E. Rep. 108, 39 L. R. A. 116; *North St. Ry. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. Rep. 1006, 74 Am. St. Rep. 157; *Commissioners v. Lee*, 3 Colo. App. 177, 32 Pac. Rep. 841; *Flinn v. County*, 60 Ark. 204, 29 S. W. Rep. 449, 27 L. R. A. 669, 46 Am. St. Rep. 168. These are supported by later editions of *Greenleaf's Evidence*, vol. 1, § 310, and by 3 *Wigmore, Ev.* § 2203.

In *Webb v. Page*, *supra*, it is said that: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge—without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him." It is said that, while one owes a duty to the state to come forward, on proper formal process at the instance of a litigant, and testify to what he knows of matters in dispute, he ought not to be compelled to assist a private party in a suit about which he has no knowledge of facts in contro-

versy, and about which he is asked to contribute professional services. Those holding to the view that the professional man may refuse to so serve the litigant put it largely upon the ground that to force him would be akin to taking one's property against his will for the benefit of another. It seems to us that, in the discussion of the subject, there are some illustrations given which are not apt. Thus, in support of the view that the professional expert should be compelled to testify as to matters of expert opinion, it was asked, and the question has been often quoted since, that, "Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing in the same coach, while a chimney sweeper and a barrow woman were in dispute about a half-penny worth of apples, and the chimney sweeper or the barrow woman were to think proper to call upon them for their evidence, could they refuse it? No! Most certainly not." Every one (including the expert) would yield ready assent to that statement. The expert would not say that he should not be called to give testimony to anything he may know of the case as any other witness, exalted or lowly. His claim is that he ought not to be put on any other plane than the ordinary witness, and ought not to be made to contribute from his calling in life to the benefit of a stranger. It must be admitted that there is strong argument to support either view. It is not far-fetched to suppose a physician or surgeon of such wide reputation for skill and ability that his service as a witness would be required to such an extent as to seriously cripple the practice of his profession for his own benefit. There are instances where a professional man has devoted his life to the free service of his fellows, but it has never yet been said that he could be compelled to do so. If it were known that the free services (save ordinary witness fee) of the most eminent professional men of the country could be compelled at the instance of any litigant, might he not be required to devote a great part, or all, of his time in attendance upon courts or in giving his deposition, for the purpose of answering hypothetical questions on suppositional facts? It is sufficient to call for grave consideration when a rule is asked to be enforced which could lead to such results. On the other hand, all must concede that the physician, surgeon, or lawyer is not entitled to any more consideration than an expert in any other calling. A farmer, a mechanic, a merchant, and he who follows most any avocation, may be qualified to testify as an expert in cases which call for the peculiar knowledge which he possesses, and which he has spent his time and money in acquiring. If either of these could demand compensation (more than an ordinary witness fee), the administration of the law would undergo a radical change. As illustrated in *Ex parte Dement*, 53 Ala. 394, 25 Am. Rep. 611, there may be litigation concerning the sale, or contract for sale, of any commercial commodity. The contract could be proved by the parties, docu-

ments, or those acquainted with its terms, and yet it might, perhaps, be necessary to prove the value of such commodity in certain markets on a given day. Dealers in such commodities, entire strangers to the litigants, and wholly disinterested in their affairs, could be compelled to testify as to such value, though it involved a special knowledge gained in the prosecution of their special calling. Like instances in great number could be given, all of which should be classed as expert knowledge gained at expense to the possessor, and out of which he obtains his living.

After consideration of the question in all its bearings, we have arrived at the conclusion that a witness called to testify as an expert, whether as a physician or in any other branch of knowledge, may be compelled to state his opinion upon hypothetical or other questions involving his professional knowledge, without compensation other than the witness fee taxed to the ordinary witness. It is a duty he owes to the state in aid of its orderly existence, and in return for which he enjoys its protection and the administration of its laws in his behalf, not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman, or other person, to come to his aid when needed in litigation in which he might unfortunately be involved. Indeed, in this very case the plaintiff invoked the special knowledge of his professional brethren in aid of the price he charged for his attendance upon the court, and there was no thought of it not being their bounden duty to give to the court and jury, in his behalf, the benefit of their information derived through the experience and study of their profession. In England there was a statute (St. 5 Eliz., ch. 9, § 12) providing a penalty against the witness "who having not a lawful and reasonable lot or impediment to the contrary," fails to appear to testify in a cause after process served upon him, "and having tendered unto him or them, according to his or their countenance or calling such reasonable sums of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf." It is possible that such statute has had its influence in the course of judicial decision, and has fostered distinctions that would otherwise not have obtained. Distinctions did exist at the date of that statute, and before and since its enactment, so that a witness in high social, official, or professional life was thought to require more for his expense in attendance upon the court. These have largely disappeared, though we find that, as to the professions of law and medicine, they have remained with sufficient tenacity to influence claims for extra compensation from persons practicing those professions to this day. Thus, *Severn v. Olive*, 3 Brod. & Bing. 72, was an action on an insurance policy covering a sugar house which burned. The defense was that the owner had used a newly invented process for boiling sugar which was more dangerous than

the old. To test or prove this, a number of expensive experiments were made by each party, which consisted in the employment of highly heated oil; and many scientific and professional men of eminence were called as witnesses to give their opinions as to the comparative safety or danger of the process. Various sums were allowed these witnesses by the prothonotary. These were afterwards disallowed. The court said that "no allowance ought to be made * * * for the time of scientific witnesses, unless they were medical men, such as physicians or surgeons." And in *Lopes v. De Taset*, 3 Brod. & Bing. 292, costs were not allowed for the time of a broker witness, as it was objected that none such could ever be allowed except for "medical men or solicitors." In *Moor v. Adam*, 5 Maule & Sel. 156, compensation for loss of time was refused two merchant witnesses coming from abroad. In a note appended to the report of that case, it is shown that Lord Ellenborough remarked that "he believed the practice had been to make allowance to medical men and attorneys, but not to others." So far as the matter of loss of time is concerned, there is no good reason why a physician or an attorney should be preferred to any other witness, and the law now very properly puts all upon the same level. These considerations, while not affecting the question whether a physician is entitled to compensation on the ground of performing service for the party calling him, yet explain, to some extent, why it is that there has grown up an idea that an expert in medicine, surgery, or law should be entitled to compensation for stating his knowledge of those professions upon the witness stand, when rarely a claim is made for the innumerable calls for expert evidence from other avocations. It should be remembered that the duty the expert owes to the state, as a performance of citizenship, rather than a rendering of service to an individual, pertains to an obligation to give the court the benefit of the knowledge he has in store at the time he is called upon. He cannot be required to especially fit himself for lines of enquiry. He should not be expected to make examinations, perform professional service, and the like, for that is not the office of a witness. He could not be compelled to do that any more than an ordinary person, with no knowledge of the facts pertaining to a case, should be required to go and post himself so as to become a witness; and so the court said, in *Ex parte Dement*, 25 Ala. 397, 25 Am. Rep. 611, that "nothing we have said is intended to support the proposition that a physician or surgeon could be punished as for contempt for refusing, unless paid therefor, to make a post mortem examination, or undertake any other operation, requiring skill and special professional training, in order to qualify himself, when desired by a court so to do, to testify in a cause." In *Finn v. Prairie County*, *supra*, it was held that the expert could not be required to attend upon a trial and listen to testimony so

as to qualify himself. "An expert cannot be compelled to examine a case in order to give a professional opinion, nor to make a post mortem examination or analyze the contents of a stomach, nor to attend at a trial to hear and consider the testimony given, so as to qualify himself to give a deliberate opinion on a question of science arising upon such testimony." *Lawson on Expert & Opinion* Ev. 317. "If the witness be required to do any particular thing, as to analyze the contents of a stomach, or perform a post mortem operation—in these and similar cases, such services cannot be compelled by the ordinary process of subpoena, or the labor required by the payment of an ordinary witness fee." *Commissioners v. Lee*, 3 Colo. App. 177, 32 Pac. Rep. 84.

But plaintiff also put his right to a judgment upon another ground, distinct from the first; and that is, that defendant agreed to pay him a compensation for his services as expert witness. In our opinion a contract would be valid to pay an expert witness for any service which the law does not compel him to do as a witness free of charge, as already pointed out. For all such service he is entitled to claim compensation; but an agreement to pay such expert (whether doctor or lawyer) for being a witness as to those matters which we have held the law and his duty as a citizen require him to testify to, would be invalid. As already stated, he is in such respect on the same plane with any other witness, and the agreement would be without consideration, and it would be against public policy. *Dodge v. Stiles*, 26 Conn. 463; *Pool v. Boston*, 5 Cush. (Mass.) 219. We are cited to *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. Rep. 141, 32 L. R. A. 619. We do not need to approve or take issue with that case. It is not put on any very definite ground; but it seems the witness not only agreed to become a witness without a subpoena, but that he attended the trial and assisted with his expert knowledge, thus doing more for the party calling him than the law would have compelled him to do. It is urged as one of the reasons why plaintiff was entitled to recover that he always charged extra for attendance as a witness in the line of his profession, and that defendant knew that, and with such knowledge had him subpoenaed. We think that such consideration should not afford any help to plaintiff's case. The fact that he may have exacted compensation for attending court as a witness in other instances, which the law did not justify, should not legalize his claim.

On a retrial of the case, it ought to be easily seen whether plaintiff has a cause of action within the limits of the law as we have herein stated it.

The judgment is reversed, and the cause remanded. All concur.

NOTE.—Allowance of Extra Compensation for Expert Witnesses.—The question considered so ably by the court in the principal case has always given considerable difficulty to painstaking jurists and while superficial judges will dismiss its consideration with the observation that the weight of authority is now opposed to any extra allowance to be made to witnesses who are compelled to give expert opinion evidence, there will be other judges, like the learned judge in the principal case, who will observe the fact that the rule, which the majority of the courts have been led to sustain, has in it an element of injustice which is only counterbalanced by the grave public expediency which supports the majority rule.

It cannot be denied that at common law and in the very early days of English practice it was customary to pay lawyers and physicians, and possibly clericals and statesmen or others competent from position or study to give expert testimony in a case, extra compensation for such services. And it is quite evident that the statute of 5 Eliz., ch. 9, merely formulated this pre-existing custom by providing that witnesses should be paid according to their countenance and calling, a reasonable sum. As the court in the principal case has so well shown, this custom under this statute gradually narrowed itself down until the only experts who were given any extra consideration for their services were lawyers and physicians.

The court in the principal case has presented with especial frankness the strength of the position of those that contend that expert witnesses should not be compelled to testify as to matters of opinion based on hypothetical questions without extra compensation. The whole argument (and it is indeed a strong one) may be summed up as follows: The skill and professional experience or knowledge possessed by any individual is his own property acquired by hard labor and diligent observation, and as in the case of a lawyer or physician, is his only capital in life, in the acquisition of which, sometimes, he has paid a great price or made great sacrifices. It is the particular thing which he has for sale, and to require that he give it away, at the state's command, to any litigant who may choose to demand his services, seems indeed unreasonable. It seems to require more from him than it does from other citizens, in that it takes his property, the only thing of any value to him, and gives it to others for a public purpose (the advancement of justice) without proper compensation. We do not think it is any answer to this argument to say that other citizens, such as butchers and bakers and candle stick makers, together with real estate dealers and brokers and business men experienced in all branches of commercial enterprises may also be compelled to give expert testimony concerning the line of business in which they are experienced, since in such cases such knowledge is only of incidental value, is not for sale nor salable and its compulsion cannot in any sense be said to deprive the witness of any property in the strict sense of that term. The physician's diagnosis, opinion and prescription is the only thing he has for sale, and in compelling him to give expert evidence in a case you compel him to give away all of this except the prescription which is often the least valuable of all his knowledge. While the lawyer is in practically the same position as the physician so far as the character of his property is concerned, he nevertheless has almost complete protection from enforced opinions on questions of law by the election of trial judges at large salaries to pass upon all questions

of law which may arise in a case. It is only in rare cases, such as proving the authenticity of a foreign statute or decision that a lawyer may be really required to give his opinion on a question of law. It is therefore the physician, of all professional men, who is more harshly imposed upon by the rule laid down, by the majority of the courts of this country, denying reasonable compensation for opinion evidence.

On the other hand, it should stand out very clearly to every thoughtful and practical student of law that any rule which would exempt witnesses from the stern command of a *subpœna ad testificandum*, simply because the demand of that witness for a reasonable compensation for his services as a witness was not complied with by the party calling him, would be an intolerable and ridiculous interference with the due and prompt administration of justice. The trial of a case in court is a public and not a private proceeding, and it is a proceeding so vital to the perpetuity of our free institutions, that men so required to attend as witnesses are required to lay aside "all manner of excuse" and the severest possible penalty is inflicted on witnesses who refuse or fail to obey the process of the court, to-wit, the attachment of their persons and imprisonment as for contempt. It is therefore absolutely essential that no man shall be permitted, by reason of any manner of excuse, to refuse to obey such a subpoena or to refuse to testify as to any matters which the court may properly inquire of him. Nor is there any distinction in this regard between criminal and civil cases. As was said by the court in the case of *Dixon v. People*, 168 Ill. 179, where a distinction was attempted to be made because the expert opinion of a physician was sought to be compelled by a litigant in a civil case for his own private advantage: "It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the state should be punished."

As this question is still an open question in most of the states of the Union, a few suggestions might not be out of place. In the first place, it is probable that no supreme court will care to follow the experience of the Indiana Supreme Court in the case of *Buchman v. State*, 59 Ind. 1, and permit physicians to refuse to testify in a case unless a reasonable amount shall be first tendered for such services. The condition resulting from such decision became so intolerable in Indiana that a statute was passed expressly abolishing the rule laid down by the courts. Nor do we commend the situation as it exists to-day in most of our states. An opinion is something which is not always definite; indeed we find an expert physician giving expert evidence sometimes on both sides of the same case and often on different sides of the same proposition, which has aroused general suspicion that mercenary considerations have affected the witness' judgment. With this suspicion aroused, such evidence becomes worthless and is generally disregarded by juries. This is not as it should be, as such evidence, if given without prejudice is of the greatest possible value in many cases, and if given proper credence by juries would effectually terminate many cases without regard to other evidence. To make such evidence absolutely trustworthy the state should fix a reasonable compensation to be allowed physicians and surgeons and make, not only invalid, but criminal, as tending to pervert the due administration of justice, any contracts made by litigants in procuring such testimony for a consideration paid or to be paid. In some states

the fee for a physician required to give opinion evidence is fixed at ten dollars *per diem* to be taxed as costs. We believe such a statute is preferable to one which leaves the amount open to be fixed by masters or referees or in the discretion of the trial court. At any rate legislation is sadly lacking at this point and the due administration of law is being affected by the need of proper regulation of the means and practices by which opinion evidence is often procured.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

FROM FAR-OFF SEATTLE.

While we have always had the good will of that large body of representative lawyers in this country who number themselves among our subscribers, we are not so often remembered by our lay brethren of the press, that we are not somewhat puffed with pride when news comes from such sources announcing the fact that the influence of the CENTRAL LAW JOURNAL is being felt even beyond professional limits. Therefore, our pleasure may be imagined when we picked up the Seattle Republican of Nov. 22, 1907, and saw the following very complimentary editorial paragraph: "CENTRAL LAW JOURNAL is unquestionably the ablest journalistic exponent of the laws of the land published and no lawyer should be without a copy of it." We have never been able to express our own editorial purpose in any more comprehensive and concise statement. As the exponent of the law and not of men, the CENTRAL LAW JOURNAL has achieved its greatest success, and this statement is proven by the frequency with which citations to our past volumes appear in the opinions of courts of last resort in every state of the union.

RESTRAINING ORDER IN CASE OF STATE V. MITCHELL, ET AL.

At a Circuit Court of the United States for the Northern District of West Virginia, continued and held in Phillippi in said district, on the 24th day of October, 1907, the following order was made and entered of record, to-wit:

Hitchman Coal & Coke Company, a corporation organized under and by virtue of the laws of the state of West Virginia, and citizen of said state having its principal office at Wheeling, in said state and district, plaintiff,

versus

John Mitchell, of Indianapolis, a citizen of the state of Indiana, individually, and as president of the United Mine Workers of America and of the International Union United Mine Workers of America, et al. defendants.

On this 24th day of October, 1907, Hitchman Coal & Coke Company, a corporation organized under and by virtue of the laws of the state of West Virginia, and citizen of said state, having its principal office at Wheeling, in said state and district, the plaintiff in the above entitled suit in equity by George R. E. Gilchrist, its counsel, presented to the court its bill of complaint duly verified by the affidavit of E. T. Hitchman, president of said Hitchman Coal & Coke Company, and alleging in effect among other things, that the said defendants are conspiring together to unionize plaintiff's coal mine without plaintiff's con-

sent and against plaintiff's will, and in so doing and in trying to effectuate said unlawful object the said defendants are about to cause a large number of plaintiff's employees to cease working for plaintiff, contrary to the terms of their employment by the plaintiff and in violation of their contract of service with plaintiff; are resorting to the usual expedients of compelling or inducing, by threats, force, intimidation, violence, violent or abusive language, or persuasion, plaintiff's employees to leave its service, also contrary to the terms of their employment by plaintiff, and in violation of their contractual obligations with plaintiff, and threaten to close down plaintiff's mine and not permit plaintiff to operate its mine until such time as plaintiff shall agree to unionize its mine and employ none but union labor who are members of the United Mine Workers of America; and also alleging in effect that unless this court shall grant an immediate restraining order preventing said defendants, and each and every of them, their committees, agents, servants, confederates and associates, from doing the said things complained of in said bill of complaint and purposed as set forth therein, and specially the enforced shutting down of plaintiff's mine and enforced idleness, unless and until plaintiff shall accede to the demands of said defendants, unionize its mine and employ only union labor, members of said United Mine Workers of America, irreparable injury and damage will be suffered by plaintiff; and said plaintiff thereupon presented and filed with its said bill, in support thereof, the affidavits of W. H. Koch, E. C. Pickett, James Stewart, Clyde Rowand, J. M. Hart, Robert Myers, S. A. Rowand, E. C. Pickett, Wes. Corns, E. C. Pickett, William Daugherty, John Hull, J. W. Logston, C. G. Davis, J. C. McKinley, C. G. Davis and J. C. McKinley.

Upon consideration whereof, the said bill of complaint is ordered to be filed and process is ordered to be issued thereon, and it appearing to the court that a temporary restraining order should be allowed as prayed for in said bill of complaint, it is therefore adjudged, ordered and decreed by the court that said defendants, and each and every of them, their committees, agents, servants, confederates and associates, be restrained and strictly enjoined from interfering and from combining, conspiring, or attempting to interfere with the employees of the plaintiff for the purpose of unionizing plaintiff's mine, without plaintiff's consent, by representing or causing to be represented in express or implied terms, to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, assigning, representing or causing to be represented in express or implied terms to such employee or employees that such loss or trouble will or may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine.

From interfering and from combining, conspiring or attempting to interfere with employees of plaintiff for the purpose of unionizing plaintiff's mine, without plaintiff's consent, and in aid of such purpose knowingly and wilfully bringing about in any manner the breaking by plaintiff's employees of contracts of service known to them at the time to exist, which plaintiff now has with its employees, and from knowingly and wilfully bringing about in any manner the breaking by plaintiff's employees of contracts of service which may hereafter be entered into by persons with plaintiff and be known to them while the relationship of employer and employee, as to such employee so

brought to break his contract, exists, and especially from knowingly and wilfully enticing plaintiff's employees, present or future, knowing of such relationship, while the relationship of employer and employee, as to such employee so enticed, exists, to leave plaintiff's service, giving or assigning directly or indirectly as a reason for any such act so brought about, or enticement and leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a non-union mine, or that the interest of the United Mine Workers of America requires that plaintiff shall not be permitted to run a non-union mine, or that the interest of the union will be best promoted thereby.

From interfering and from combining, conspiring or attempting to interfere with the employees of plaintiff so as knowingly and wilfully to bring about in any manner the breaking by plaintiff's employees of contracts of service, known to them at the time to exist, which plaintiff has now with its employees, and from knowingly and wilfully bringing about in any manner the breaking by plaintiff's employees of contracts of service which may hereafter be entered into by persons with plaintiff, and be known to them, while the relationship of employer and employee, as to such employee so brought to break his contract, exists, and especially from knowingly and wilfully enticing plaintiff's employees, present or future, knowing of such relationship, while the relationship of employer and employee, as to such employee so enticed, exists, to leave plaintiff's service, without plaintiff's consent, against plaintiff's will, and to plaintiff's injury.

From interfering with, hindering or obstructing any of the business of plaintiff, or its agents, servants or employees, in the discharge of their duties as such, at and about plaintiff's mine, or elsewhere, by trespassing on or entering upon the grounds and premises of plaintiff, or within its mine, for the purpose of interfering therewith, or hindering or obstructing its business in any manner whatsoever, or with the purpose of compelling or inducing, by threats, force, intimidation, violence, violent or abusive language, or persuasion, any of the employees of plaintiff to refuse or fail to perform their duties as such employees.

From compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence, or abusive or violent language, any of the employees of plaintiff to leave its service or fail or refuse to perform their duties as such employees, or to compel or attempt to compel by threats, intimidation, force, violent or abusive language, any person desiring to seek employment in or about plaintiff's mine and works from so accepting employment therein.

From entering upon or establishing a picket or pickets of men on or patrolling railroad or street cars passing through or adjacent to the plaintiff's property for the purpose of inducing or compelling by threats, intimidation, violence, violent or abusive language, or persuasion, any employee of plaintiff to fail or refuse to perform his duties as such, or for the purpose of interviewing or talking to any person or persons on said railroad or street cars coming to plaintiff's mine to accept employment with plaintiff, for the purpose and with the intention of inducing or compelling them, by threats, violence, intimidation, violent or abusive language, persuasion, or in any other manner whatsoever, to refuse or fail to accept service with plaintiff.

From compelling or inducing or attempting to compel or induce by threats, force, intimidation, or violent or abusive language, any employee of plaintiff to refuse or fail to perform his duties as such em-

ployee, and from compelling or attempting to compel or induce, by threats, intimidation, force, or violence, or abusive or violent language, any such employee to leave the service of plaintiff, and, by like methods, to prevent or attempt to prevent any person desiring to accept employment with plaintiff in or about its mine or works or elsewhere, from doing so by threats, violence, intimidation, or violent or abusive language.

From interfering in any manner whatsoever, either by threats, violence, intimidation, persuasion or entreaty with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to entice or induce him to quit the service of plaintiff or to fail or refuse to perform his duties under his contract of employment, and from ordering, aiding, directing, assisting, or abetting in any manner whatsoever any person or persons to commit any or either of the acts aforesaid.

From congregating at or near the premises of plaintiff, and from picketing and patrolling said premises for the purpose of intimidating plaintiff's employees or coercing them by threats, intimidation, violence, abusive or violent language, or preventing them, in the manner aforesaid, from rendering their service to plaintiff, and, in like manner, from inducing or coercing them to leave the employment of plaintiff, and from in any manner so interfering with the plaintiff in carrying on its business in its usual and ordinary way, and from interfering by threats, intimidation, violence, violent or abusive language, any person or persons who may be employed or seeking employment by plaintiff in the operation of plaintiff's mine and works.

From, either singly or in combination with others, collecting in or about the approaches to plaintiff's mine and works, for the purpose of picketing or patrolling or guarding the streets and approaches to the property of plaintiff for the purpose of intimidating, threatening or coercing any of plaintiff's employees from work in its said mine or works, or any person seeking employment therein, from entering into such employment and from so interfering with said employees in going to and from their daily work in and about the mine and works of plaintiff.

And from, either singly or collectively, going to the homes or boarding houses of plaintiff's employees, or any of them, for the purpose of intimidating or coercing any or all of them to leave plaintiff's employment.

The motion for an injunction in this suit is set down for hearing in the United States Court Room at Parkersburg, on the 14th day of January, 1908, at 8 o'clock a. m.

This restraining order is not to take effect until said plaintiff or some responsible person for it shall enter into a bond in the penal sum of two thousand dollars, with surety therein satisfactory to the clerk of this court, conditioned that said plaintiff shall pay all such costs and damages as are sustained by the defendants, or any of them, by reason of this restraining order should it be hereafter dissolved.

Service of a copy of this order on the defendants, their committees, agents, servants, confederates and associates, or any of them, shall be deemed and held sufficient notice of this order.

ALSTON G. DAYTON,
Judge.

[We are publishing the above decree, a copy of which we received through the courtesy of Geo. K. E. Glechrist, of Wheeling, W. Va., as the most extensive and far-reaching writ of injunction ever employed in preventing the "calling" of a strike and preventing the "unionizing" of a shop. Such decrees have been refused by some courts, but to our mind it represents the advance ground to which all the courts of the land are steadily advancing.]

BOOKS RECEIVED

Trial Evidence. A Synopsis of the Law of Evidence Generally Applicable to Trials. By Richard Lea Kennedy, LL.D., of the St. Paul Bar. St. Paul, Minn. The Keefe-Davidson Co. 1906. Review will follow.

HUMOR OF THE LAW.

The late ex-Governor Robinson used to tell a story in which he acknowledged that the only witness who ever made him throw up his hands and leave the courtroom was a green Irishman.

Mr. Robinson at the time was counsel for one of the big railroads. A section hand had been killed by an express train and his widow was suing for damages. The railroad had a good case, but Mr. Robinson made the mistake of trying to turn the main witness inside out.

The witness in his quaint way had given a graphic description of the fatality, occasionally shedding tears and calling on the saints. Among other things he swore positively the locomotive whistle was not sounded until after the whole train had passed over his departed friend. Then Mr. Robinson thought he had him.

"See her Mr. McGinnis," said Mr. Robinson, "you admit that the whistle blew."

"Yes, sor; it blew, sor."

"Now, if that whistle sounded in time to give Michael warning, the fact would be in favor of the company, wouldn't it?"

"Yes, sor, and Mike would be testifying here this day." The jury giggled.

"Never mind that. You were Mike's friend, and you would like to help his widow, but just tell me now what earthly purpose there could be for the engineer to blow that whistle after Mike had been struck?"

"I presume that the whistle wor for the nixt man on the thrack, sor."

Mr. Robinson retired, and the widow got all she asked for.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABDUCTION—Evidence.—An indictment under Pen. Code 1895, § 110, charging fraudulently leading away certain minors from their parent, contemplates taking either by force or force by putting in fear, and testimony that defendant said that the minor must go with him, and almost made the minor meet him, was admissible.—Barker v. State, Ga., 57 S. E. Rep. 959.

2. ACTION—Private Nuisance.—A proceeding to enjoin a private nuisance was a proceeding in equity, and its character was not changed by the fact that an allegation and claim of damages in a certain amount was inserted in the bill.—Geltz v. Amsden, Mo., 102 S. W. Rep. 1067.

3. ADVERSE POSSESSION—Elements.—A possession commencing in subordination to the true title of another does not change into a hostile one, unless the occupant brings notice home to the holder of the title by open acts unequivocal in character that he holds against all claimants.—McCune v. Goodwillie, Mo., 102 S. W. Rep. 997.

4. ADVERSE POSSESSION—Partial Obstruction of Highway.—No lapse of time will deprive the public of its right to have an encroachment on a highway removed where the encroachment does not extend to the full width of the highway and entirely cut off travel.—City of New York v. De Peyster, 105 N. Y. Supp. 612.

5. ANIMALS—Liability of Hirers.—Where mules are hired with the understanding that the owners assume the risk of all injuries, the hirers are not liable unless the injuries result from their gross neglect or willful misconduct.—Evans & Pennington v. Nail, Ga., 57 S. E. Rep. 1020.

6. APPEAL AND ERROR—Affidavit Charging Illegal Judgment.—Though in an illegality case the *f. fa.* be introduced in evidence, it may nevertheless be specified as record, and the bill of exceptions will not be dismissed because the *f. fa.* is referred to in the bill as being attached thereto, though not otherwise identified.—Miller v. Perkerson, Ga., 57 S. E. Rep. 787.

7. APPEAL AND ERROR—Amendment After Remittitur.—After remittitur has once been entered on the minutes of the court of errors and appeals, it is not subject to substantial alteration or amendment except by order of the court.—*In re* Wheaton's Will, N. J., 67 Atl. Rep. 187.

8. APPEAL AND ERROR—Appealable Orders.—An order refusing to set aside a judgment rendered after a trial and verdict is not appealable when based on a motion to set aside on the ground that the special verdict did not warrant the judgment.—Olson v. Mattson, N. Dak., 112 N. W. Rep. 994.

9. APPEAL AND ERROR—Brief of Evidence.—Where there is no distinct question of law for adjudication apart from the evidence raised by bill of exceptions, and there is no brief of such evidence, the court cannot consider any of the assignments of error.—Rucker v. Tabor & Almand, Ga., 57 S. E. Rep. 967.

10. APPEAL AND ERROR—Contracts.—Where the contract price for the construction of a factory by plaintiff

was paid in full by certain subscribers to the contract, plaintiff had no valid demand against those who did not pay.—Hastings Industrial Co. v. Baxter, Mo., 102 S. W. Rep. 1075.

11. APPEAL AND ERROR—Quo Warranto.—That relator's term of office expired pending an appeal by defendant does not deprive relator of the right to have the judgment affirmed.—Decker v. Daudt, N. J., 67 Atl. Rep. 375.

12. ARBITRATION AND AWARD—Action on Award.—In a suit on an alleged common-law award, plaintiff makes out a *prima facie* case by proving the submission and the award.—Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co., Ga., 57 S. E. Rep. 879.

13. ASSAULT AND BATTERY—Self Defense.—One charged with the offense of stabbing may show either that it was done in self-defense, or under other circumstances of justification, and a charge limiting defendant's right of justification to the defense of his life or limb is erroneous.—Edmondson v. State, Ga., 57 S. E. Rep. 947.

14. ATTACHMENT—Damages for Wrongful Attachment.—In a suit by one whose property has been taken from his possession under attachment against another, where only actual damages are sought, malice and lack of probable cause are not essential allegations.—Williams v. Inman, Ga., 57 S. E. Rep. 1009.

15. ATTORNEY AND CLIENT—Joint Trespassers.—Where an agent on behalf of himself and his client causes an attachment to be levied on the goods of a third person while in the latter's possession, the attorney and client may be joined as trespassers.—Williams v. Inman, Ga., 57 S. E. Rep. 1009.

16. ATTORNEY AND CLIENT—Release of Lien.—An attorney has no authority to release a fund from a lien in favor of his client without the client's express consent, and where he does so the release will be set aside.—Van Kannel Revolving Door Co. v. Astor, 105 N. Y. Supp. 683.

17. AUDITA QUERELA—Scire Facias.—Where *scire facias* on bond for appearance to answer criminal charge was not issued until too late to be returnable at the proper term, court held to have authority to direct a new *scire facias* to issue returnable at a succeeding term, without causing a new forfeiture of the bond to be entered.—Bird v. Terrell, Ga., 57 S. E. Rep. 777.

18. BAIL—Forfeiture of Bond.—Committing trial or express waiver thereof held not essential to forfeiture of bond taken by justice of the peace binding obligor to appear at superior court to answer charge against him.—Bird v. Terrell, Ga., 57 S. E. Rep. 777.

19. BANKRUPTCY—Commissions of Trustee.—Where a creditor, who purchased property of a bankrupt, was permitted to deduct from the purchase price the distributive share of the same to which he was entitled as creditor, the trustee is entitled to commission on such amount as a dividend paid.—*In re* Morse Iron Works & Dry Dock Co., U. S. D. C., E. D. N. Y., 154 Fed. Rep. 214.

20. BANKRUPTCY—Decree of Court.—Decree of federal district court for the transfer to adverse claimants of proceeds of sale of property not in possession of trustee of bankrupt, without prejudice to the rights of such trustee, held a sufficient compliance with the mandate of the Federal Supreme Court.—*Ex parte* First Nat. Bank of Chicago, U. S. C. C., 27 Sup. Ct. Rep. 23.

21. BANKRUPTCY—Debts Contracted in Fiduciary Capacity.—A discharge in bankruptcy is a good defense to a suit by a surety on the bond of a trustee in bankruptcy in another bankruptcy estate, where plaintiff became surety on notes discounted to raise the money where-with defendant trustee paid off a misappropriation of the bankrupt estate, and paid them, the debt not having been contracted while acting in a fiduciary capacity within Act Cong. July 1, 1898, ch. 541, § 17a, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3429].—Leinkaof v. Wellhouse, Ga., 57 S. E. Rep. 961.

22. BANKRUPTCY—Election of Trustee.—Where, at a meeting of a bankrupt's creditors, which was adjourned without electing a trustee, a controversy developed

which rendered it probable that there could be no election, the court or referee may appoint, without awaiting further action of the creditors.—*In re Morris*, U. S. D. C., M. D. Pa., 154 Fed. Rep. 211.

23. **BASTARDS—Proof of Legitimacy.**—A declaration in a father's will that a boy named therein is his son is insufficient to enable the boy to participate in a portion of the estate left by his deceased father's brother, where there is no other evidence of such relationship.—*In re Wharton's Estate*, Pa., 67 Atl. Rep. 414.

24. **BILLS AND NOTES—Bona Fide Purchasers.**—A bank discounting a note for a depositor and giving him credit held a bona fide purchaser if the full amount of the deposit is drawn out, or the deposit account is reduced to an amount less than the proceeds of the discounted papers.—*Security Bank of Minnesota v. Petruschke*, Minn., 112 N. W. Rep. 1000.

25. **BILLS AND NOTES—Holder for Value.**—Where a note is transferred before maturity in payment of a pre-existing debt, the transferee is a holder for value, and takes free from equities between the original parties.—*Harrell v. National Bank of Commerce*, Ga., 57 S. E. Rep. 869.

26. **BROKERS—Unauthorized Sale.**—A sale by a stockbroker on the ground that the margin was exhausted held unauthorized.—*Hurt v. Miller*, 105 N. Y. Supp. 775.

27. **CARRIERS—Acceptance of Shipment.**—Where the evidence showed a prevailing custom by a railroad to place a car on its transfer track in a certain town, it was not a delivery of the car to defendant road under such custom until the car was actually accepted by the train crew of defendant.—*Seaboard Air Line Ry. v. Friedman*, Ga., 57 S. E. Rep. 773.

28. **CARRIERS—Bill of Lading.**—Bill of lading on which is stamped "Not negotiable unless delivery is to be made to the consignee or order" held exempt from the provision of Gen. St. 1894, § 7649, as to negotiability.—*Barnum Grain Co. v. Great Northern Ry. Co.*, Minn., 112 N. W. Rep. 1030.

29. **CARRIERS—Delay in Delivering Freight.**—A railroad agreeing to deliver certain freight consigned to plaintiff, at the latter's place of business, over connecting lines, instead of at its own terminals, held liable as a common carrier for damages resulting from delay in delivering the freight.—*Cohen v. Missouri, K. & T. Ry. Co.*, Mo., 102 S. W. Rep. 1029.

30. **CARRIERS—Loss of Goods.**—In an action against a carrier for loss of goods occasioned by a flood submerging the cars in which they were shipped while in a yard awaiting further transportation, a finding of negligence in placing cars in the yard at the time held authorized.—*Atchison, T. & S. F. Ry. Co. v. Madden, Sykes & Co.*, Tex., 103 S. W. Rep. 1193.

31. **CARRIERS—Transportation of Goods.**—Where a railway company after issuing a bill of lading on which is stamped "Not negotiable unless delivery is to be made to the consignee or order" delivers the goods to the consignee named therein without requiring the bill of lading to be produced, it does so at its peril.—*Barnum Grain Co. v. Great Northern Ry. Co.*, Minn., 112 N. W. Rep. 1030.

32. **CHARITIES—Construction of Testamentary Powers.**—Under a will creating a charitable trust and directing the trustees to nominate and so far as they legally can to appoint their successions in office, such nominations may be made by them, subject to the final action of the court.—*Selleck v. Thompson*, E. I., 67 Atl. Rep. 425.

33. **CHattel MORTGAGES—Removal.**—In the absence of specific statutory provisions regarding the removal of mortgaged chattels, the proper original record of a chattel mortgage is sufficient to continue the lien thereof, notwithstanding the removal of the property to another own, county, or state.—*Himmels v. Sentons*, Cal., 31 Pac. Rep. 327.

34. **COMMERCE—State Regulation of Oyster Industry.**—Rights under commerce clause of federal constitution, or under Const. U. S. Amend. 14, held not infringed by Act N. J., March 24, 1899, p. 514, § 20, as amended by Act March 22, 1901, p. 317, prohibiting use of dredging in tidal

waters for catching oysters on leased premises.—*Lee v. State of New Jersey*, U. S. S. C., 27 Sup. Ct. Rep. 22.

35. **CONSTITUTIONAL LAW—Election Contest.**—Laws 1907, ch. 538, providing for a hearing and determination by the supreme court of an election contest, held not void as imposing only ministerial duties on the court.—*Metz v. Maddox*, 105 N. Y. Supp. 702.

36. **CONSTITUTIONAL LAW—Error to State Court.**—Judgment of a state court not so enforcing a state statute as to deprive party complaining of rights in the federal constitution will not be reversed in the Supreme Court of the United States.—*Lee v. State of New Jersey*, U. S. S. C., 27 Sup. Ct. Rep. 22.

37. **CONSTITUTIONAL LAW—Judicial or Legislative Question.**—Whether an act is obnoxious to that provision of the state constitution prohibiting the passing of a special law where a general law can be made to apply is a legislative question.—*Buist v. City Council of Charleston*, S. Car., 57 S. E. Rep. 862.

38. **CONTEMPT—Removal of Attached Property.**—The taking of property, attached in an action against a non-resident, out of the state, is an act hindering and impairing the rights of plaintiff, since the judgment in the action can only be satisfied out of the attached property and constitutes a contempt.—*Lowenthal v. Hodge*, 105 N. Y. Supp. 527.

39. **CONTRACTS—Architect's Certificate.**—Production of architect's certificates held a condition precedent to owner's liability to pay, unless waived, where contract provides that payment shall be made only upon the issuance of certificates.—*Filston Farm Co. of Baltimore County v. Henderson & Co.*, Md., 67 Atl. Rep. 228.

40. **CONTRACTS—Consideration.**—The affection and sense of duty existing on the part of a child toward a dependent parent is a good consideration to support a contract for her support.—*Worth v. Daniel*, Ga., 57 S. E. Rep. 893.

41. **CONTRACTS—Substantial Performance.**—A building contract substantially performed is sufficiently performed to authorize a recovery thereon, and deductions may be made from the contract price for small omissions or defects in the work occurring in good faith.—*Van Orden v. MacRae*, 105 N. Y. Supp. 600.

42. **CORPORATIONS—Compensation of Officers.**—President of corporation, securing by his own vote increase of salary, held not entitled to recover same.—*Schaffhauser v. Arnhold & Schaefer Brewing Co.*, Pa., 67 Atl. Rep. 417.

43. **CORPORATIONS—Individual Profits of Officers.**—A corporate officer purchasing goods for the corporation from a partnership in which, unknown to the corporation, he holds an interest, must account to the corporation for the profits derived.—*Rickert v. White*, 105 N. Y. Supp. 653.

44. **CORPORATIONS—Transactions Between Corporations Having Same Officers.**—A tripartite agreement in which two corporations are parties will be presumed fraudulent as between them where their directors and chief officers are practically identical; but this presumption may be overcome by convincing proof that the transaction was fair.—*Barrie v. United Rys. Co. of St. Louis*, Mo., 102 S. W. Rep. 1073.

45. **CORPORATIONS—Unauthorized Acts of Agent.**—A letter written by an officer of a corporation expressing his personal approval of an unauthorized act done on behalf of the corporation by an agent cannot bind the corporation as a ratification.—*Mexican Nat. Coal, Timber & Iron Co. v. Frank*, U. S. C. C., S. D. N. Y., 154 Fed. Rep. 217.

46. **COURTS—Judicial Notice.**—The court will take judicial notice that "craps" is a game played with dice.—*Sims v. State*, Ga., 57 S. E. Rep. 1029.

47. **COURTS—Jurisdiction.**—Where the record is silent as to facts necessary to give jurisdiction, yet it appears on the face of the record that the court was without jurisdiction, the judgment is void.—*Franklin County v. Crow*, Ga., 57 S. E. Rep. 734.

48. **COVENANTS**—Running with Land.—A dwelling house less than 25 feet from the front street line after the widening of a street held to be in violation of a covenant against the erection of buildings within 25 feet of the front street line, though 25 feet from the original front street line.—*McDonald v. Spang*, 105 N. Y. Supp. 617.

49. **CRIMINAL LAW**—Payment of Fine.—A defendant who has paid a fine imposed with alternative of imprisonment cannot, after paying such fine, prosecute a writ of error to review the judgment, unless the fine was paid under protest and under duress.—*White v. City of Tifton, Ga.*, 57 S. E. Rep. 1088.

50. **CRIMINAL LAW**—Secondary Evidence.—Service of a notice on defendant to produce a copy of his license to sell intoxicating liquors by delivering to him personally a copy of the notice held a sufficient service to authorize secondary proof of the license, in a prosecution against him for the illegal sale of liquors.—*State v. Madeira, Mo.*, 102 S. W. Rep. 1046.

51. **CRIMINAL TRIAL**—Cross-Examination.—On a trial for murder, it was incompetent to show, on cross examination of defendant, that another came to him while defendant was in jail and said he was sorry that he was in trouble and not to say anything except to his attorneys.—*Rice v. State, Tex.*, 103 S. W. Rep. 1153.

52. **CRIMINAL TRIAL**—Declarations of Co-Defendant.—Where three persons are charged with murder, and a severance is ordered, declarations of one charged in the indictment, but not then on trial, at the time of the commission of the act, are admissible.—*State v. Kenney, S. Car.*, 57 S. E. Rep. 859.

53. **CRIMINAL TRIAL**—Disorderly Conduct.—Where, in proceedings to charge defendant as a disorderly person, an improper judgment was rendered on appeal to the court of quarter sessions which was set aside by the supreme court on *certiorari*, a new trial was not required, but the case would be remanded for entry of a proper judgment.—*Terhune v. Reed, N. J.*, 67 Atl. Rep. 180.

54. **CRIMINAL TRIAL**—Instruction as to Reasonable Doubt.—While the courts are required in all criminal cases to charge the law of reasonable doubt, they are not required to repeat such charge specifically as to every proposition that may arise in the case.—*Harris v. State, Ga.*, 57 S. E. Rep. 987.

55. **CRIMINAL TRIAL**—Proof of Corpus Delicto.—Where proof of *corpus delicti* is not shown beyond a reasonable doubt, a conviction must be set aside.—*Tatum v. State, Ga.*, 57 S. E. Rep. 956.

56. **DAMAGES**—Interest as an Element.—In suit for the value of property which plaintiff parted with because of deceitful statements made to him by defendant, damages were liquidated and interest was properly allowed.—*Rutherford v. Irby, Ga.*, 57 S. E. Rep. 927.

57. **DEAD BODIES**—Right of Possession.—The right to the possession of the dead body of his wife for preservation and burial belongs to the husband, and any unauthorized mutilation thereof is an invasion of this right.—*Medical College of Georgia v. Rushing, Ga.*, 57 S. E. Rep. 1088.

58. **DEATH**—Aliens.—Act Pa. 1855 (P. L. 309, § 1), authorizing suit for death by decedent's husband, etc., does not entitle one residing in Canada to recover.—*Gurofsky v. Lehigh Valley R. Co.*, 105 N. Y. Supp. 514.

59. **DIVORCE**—Adultery.—A husband is not entitled to divorce on the ground of adultery, where the wife at the time of the commission thereof was insane.—*Kretz v. Kretz, N. J.*, 67 Atl. Rep. 378.

60. **DIVORCE**—Defense of Misconduct.—The defense of misconduct of the wife, barring her right of judgment in an action for separation and support, held not sustained by showing her adultery, where by the same evidence the husband's adultery is shown.—*Hawkins v. Hawkins*, 105 N. Y. Supp. 889.

61. **EASEMENTS**—Duration and Continuity of Use.—Owners of two blocks held to have an easement in the

alley between entitling them to have it remain open.—*Scott v. Dishough, Ark.*, 103 S. W. Rep. 1153.

62. **ELECTIONS**—Affidavit of Expenses.—A political aspirant becomes a candidate at the time of filing his affidavit of intention to become a candidate for a specified office, in accordance with Rev. Laws 1905, § 184, within the meaning of the corrupt practices act (Laws 1896, p. 664, ch. 277), and is not required thereby to include in his affidavit of expense items anterior to the time of filing his affidavit of intention.—*State v. Bates, Minn.*, 112 N. W. Rep. 1026.

63. **ELECTIONS**—Ineligibility of Candidate.—That a person who is ineligible to hold the office receives a majority of the votes at an election invalidates the election, and a new election must be held.—*Dobbs v. City of Buford, Ga.*, 57 S. E. Rep. 777.

64. **ELECTRICITY**—Injuries to Contractor's Servant.—A street railway company which contracts with an individual to paint iron poles supporting the wires held liable for injuries, occasioned while painting the cap on one of the poles as an employee of the contractor who receives a charge of electricity from the cap.—*Smith v. Twin City Rapid Transit Co., Minn.*, 112 N. W. [Rep. 1001]

65. **EMINENT DOMAIN**—Water Rights.—A statute authorizing a city to acquire property for a waterwork system held to contemplate that the city shall make compensation for land and privileges taken.—*Beckerle v. City of Danbury, Conn.*, 67 Atl. Rep. 371.

66. **EVIDENCE**—Breach of Warranty.—Where plaintiffs claimed that because of some ingredient in the bleaching liquid sold by defendant goods were spoiled, testimony of a practical bleacher that he had used the same brand of liquid to bleach the same kind of goods with good results held admissible.—*Davis v. Oakland Chemical Co.*, 105 N. Y. Supp. 638.

67. **EVIDENCE**—Burden of Proof.—A mere scintilla of inconclusive circumstances does not carry the burden of proof required of plaintiff in a civil action.—*Georgia Ry. & Electric Co. v. Harris, Ga.*, 57 S. E. Rep. 1076.

68. **EVIDENCE**—Hypothetical Questions.—In an action on an accident insurance policy, held not error to refuse to allow a long hypothetical question on redirect examination based upon assumed facts of an autopsy on insured's body.—*Thomas v. Fidelity & Casualty Co. of New York, Md.*, 67 Atl. Rep. 239.

69. **EVIDENCE**—Judicial Notice.—The supreme court will take judicial notice of the appointment and subsequent election of a person to the office of circuit judge to fill the unexpired term of the deceased incumbent.—*Mayes v. Palmer, Mo.*, 103 S. W. Rep. 1140.

70. **EVIDENCE**—Presumptions.—In the absence of the record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were therein determined.—*Lawson v. United States Min. Co. U. S. S. C.*, 27 Sup. Ct. Rep. 15.

71. **EXCEPTIONS, BILL OF**—Certificate of Allowance.—The certificate of the presiding justice that exceptions have been "allowed" is conclusive as to the regularity of their allowance, in the absence of anything in the bill of exceptions to show the contrary.—*State v. Intoxicating Liquors, Me.*, 67 Atl. Rep. 312.

72. **EXCHANGES**—Bill for Protection of Quotations.—In a suit by a Chicago exchange to protect its quotations, allegations in the bill concerning the organization of defendant exchange in Kansas City and the purposes of the individual defendants to obtain complainant's continuous quotations in fraud of its rights held not objectionable for immateriality.—*Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., U. S. C. C., W. D. Mo.*, 154 Fed. Rep. 238.

73. **EXECUTION**—Joint Defendants.—A joint judgment debtor having died leaving no property prior to the revival of the judgment and the granting of leave to issue execution, the surviving defendant held not prejudiced by the court's failure to revive the judgment and authorize an execution against the decedent's estate.—*Doehla v. Phillips, Cal.*, 91 Pac. Rep. 380.

74. **EXECUTORS AND ADMINISTRATORS**—Amount of Fees.—The fact that an administrator employed three persons to represent the estate in a certain matter did not warrant an allowance against the estate of greater compensation than would have been proper in case of the employment of one attorney.—*Ward v. Koenig, Md.*, 67 Atl. Rep. 286.

75. **EXECUTORS AND ADMINISTRATORS**—Payment of Claim.—An administratrix is a competent witness on the question whether a claim for which she claims allowance has been paid, and her testimony in the absence of contradiction may be relied upon by the court.—*In re Frey's Estate, N. J.*, 67 Atl. Rep. 192.

76. **FRAUD**—Chattel Mortgage.—One receiving a chattel mortgage to secure an antecedent debt cannot maintain an action for the debtor's false representations of ownership of chattels embraced in the mortgage.—*Badger v. Pond*, 105 N. Y. Supp. 546.

77. **FRAUD**—Sales.—Fraud in representations of fact may be either in the knowledge of their falsity or without knowledge of their truth or falsity in coupling the representations with an express or implied affirmation of the knowledge of their truth.—*Crosby v. Wells, N. J.*, 67 Atl. Rep. 285.

78. **FEDERAL COURTS**—Equitable Jurisdiction.—Holder, through a patent, of legal title to a lode mining claim in possession, may maintain suit in federal circuit court in equity without prior adjudication of its legal title to quiet title, under Rev. St. Utah, § 3511.—*Lawson v. United States Min. Co.*, U. S. S. C., 27 Sup. Ct. Rep. 15.

79. **FEDERAL COURTS**—Following State Decisions.—On questions of general commercial law the courts of the United States are bound by the decisions of state courts only when such decisions are by the highest court of the state, and are based either on a statute or a long established local custom having the force of a statute.—*In re Hopper-Morgan Co.*, U. S. D. C., N. D. N. Y., 154 Fed. Rep. 249.

80. **FRAUDS, STATUTE OF**—Broker's Sale of Land.—Resident of New Jersey selling as real estate broker in Pennsylvania land situated in New Jersey, held not required to have written authority in accordance with New Jersey statute.—*Callaway v. Pretymann, Pa.*, 67 Atl. Rep. 418.

81. **GARNISHMENT**—Checks for Payment of Money.—Where a check was mailed by a debtor without any direction from the creditor, the title to the check was in the sender until delivered by the creditor, and garnishment served on the sender of the check before it left the post office where mailed was valid.—*Watt-Harley-Holmes Hardware Co. v. Day, Ga.*, 57 S. E. Rep. 1033.

82. **GARNISHMENT**—Property Subject.—Where a garnishee had sent checks to the debtor's creditors in good faith, he was under no legal duty to countermand the payment of the checks.—*Parker-Fain Grocery Co. v. Orr, Ga.*, 57 S. E. Rep. 1074.

83. **HABEAS CORPUS**—Custody of Child.—Where a court is asked to put an infant in the custody of the father, the judge should ascertain what is the real permanent interest of the infant, and if he be of sufficient discretion, should consult his wishes.—*Walker v. Jones, Ga.*, 57 S. E. Rep. 903.

84. **HIGHWAYS**—The backing of a buggy over an embankment which constituted an approach to a bridge, and which was unguarded, was not, as a matter of law, such an accident as could not reasonably have been apprehended or expected to occur.—*Wallace v. Towa of New Albion*, 105 N. Y. Supp. 524.

85. **HOMICIDE**—Dying Declarations.—Though a question put to one while dying from the effect of a pistol shot, whether he was armed at the time of the shooting, may have been somewhat leading, it did not suggest the desired answer to such extent as to render the answer inadmissible as a dying declaration.—*Rice v. State, Tex.*, 103 S. W. Rep. 1156.

86. **HOSPITALS**—Respondent Superior.—The state held not liable for the death of one caused by a railroad car

being negligently permitted to run into a building; the rule respondent superior being inapplicable.—*Martin v. State*, 105 N. Y. Supp. 540.

87. **HUSBAND AND WIFE**—Separation Agreement.—A husband's covenant that the wife might live separate from him, forming a part of the consideration for her covenant to accept a sum named in settlement of an interest in his property, being void, the entire contract was void.—*Hill v. Hill, N. H.*, 67 Atl. Rep. 406.

88. **INFANTS**—Cruelty to Children.—A girl 14 years of age is presumptively a child within Pen. Code, 1-95, § 708, providing punishment for cruelty to children.—*Stone v. State, Ga.*, 57 S. E. Rep. 992.

89. **INTOXICATING LIQUORS**—Illegal Sale.—Where defendant was charged with illegal sale of intoxicating liquors, facts held insufficient to show that the offense was committed within 12 months prior to the filing of the information.—*State v. Madeira, Mo.*, 102 S. W. Rep. 1046.

90. **JUDGMENT**—Full Faith and Credit.—Conclusiveness of settlement of executor's account, and distribution of estate in New Jersey on orders barring claims against the estate, renders repugnant to the full faith and credit clause of the constitution subsequent assessment, under Laws N. Y. 1896, p. 869, ch. 908, of a succession tax under section 222 of that act on the personal estate of decedent as a resident of New York, and making it a lien on the property and a personal obligation of the transferees and executors.—*Tilt v. Kelsey, U. S. S. C.*, 27 Sup. Ct. Rep. 1.

91. **JUDGMENT**—Pleading.—A defense of *res judicata* in an equity suit should properly be raised by plea, or where it arises after answer by a supplemental answer; but it may be considered, although raised informally by an amended answer filed by stipulation of the parties and to which no objection is made.—*Warren Featherbone Co. v. De Camp, U. S. S. C.*, N. D. Ill., 154 Fed. Rep. 199.

92. **JURY**—Objections to Jurors.—Where a defendant charged with a misdemeanor believes that one or any number of the jurors put upon him is not impartial, he has the right to have the jurors tested on request before the jury is sworn.—*Jacobs v. State, Ga.*, 57 S. E. Rep. 1063.

93. **LANDLORD AND TENANT**—Duty to Make Repairs.—The law imposes no duty upon a landlord to make repairs upon leased premises for the benefit of the tenant or his family.—*Dustin v. Curtis, N. H.*, 67 Atl. Rep. 220.

94. **LANDLORD AND TENANT**—Option to Renew Lease.—Where tenants failed to give notice required by the lease of an intention to exercise an option to renew, they became tenants holding over, removable at the landlord's will.—*Ocumpaugh v. Engel*, 105 N. Y. Supp. 510.

95. **LANDLORD AND TENANT**—Tenancy at Will.—A tenancy at the will of one party is likewise a tenancy at the will of the other.—*Hayes v. City of Atlanta, Ga.*, 57 S. E. Rep. 1057.

96. **LIFE INSURANCE**—Beneficiary.—Where a husband survived his wife, who was the beneficiary of insurance policies upon his life, and was the sole heir of his wife, upon his death, his administrators were entitled to the proceeds of the policies.—*Perry v. Tweedy, Ga.*, 57 S. E. Rep. 782.

97. **LIFE INSURANCE**—Default in Payment of Note.—Where a brother of insured after banking hours heard that a premium note was in the bank and went to the local agent of the company and found it closed, such voluntary act on his part did not prevent a forfeiture, though his intent was to pay the note.—*Hipp v. Fidelity Mut. Life Ins. Co.*, Ga., 57 S. E. Rep. 892.

98. **LIFE INSURANCE**—Right to Revoke Agency.—Where an insurance company hired an agent to solicit insurance, but no time was fixed for the continuation of the employment, it was subject to termination at the company's election.—*Aldrich v. New York Ins. Co.*, 105 N. Y. Supp. 493.

99. **LIMITATION OF ACTIONS**—Overture.—Where a person claiming an interest in land by descent from her father was married while a minor, obtained a void decree of divorce from her husband, and remarried, the statute

of limitations began to run against her cause of action to obtain possession of the land at the death of her first husband, when her disability of coverture was removed.—*Hinkle v. Lovelace*, Mo., 102 S. W. Rep. 1015.

100. LOGS AND LOGGING—Conveyance of Growing Trees.—Where an owner of land conveyed to the grantee and his heirs and assigns, forever, certain trees on a described lot, with a right to remove the same "at any time," the estate in the trees was not forfeited by the failure to remove in a reasonable time.—*North Georgia Co. v. Bebee*, Ga., 57 S. E. Rep. 573.

101. MANDAMUS—Medical Registration.—In mandamus against a medical registration board to compel petitioner's registration as a physician and surgeon, the burden is on petitioner to prove such material allegations on behalf of his claim as are denied by the answer.—*Arwine v. Board of Medical Examiners of California*, Cal., 91 Pac. Rep. 319.

102. MANDAMUS—Tenement House Inspector.—Mandamus will not lie to compel the tenement house commissioner of the city of New York to audit and pay the salary of a tenement house inspector, since he has no authority under the Greater New York charter to do so.—*People v. Butler*, 105 N. Y. Supp. 631.

103. MASTER AND SERVANT—Duty as to Inspection.—A railway company as master must inspect cars used in its trains for protection of its employees, though received from connecting carriers.—*Lucas v. Southern Ry. Co.*, Ga., 57 S. E. Rep. 1041.

104. MASTER AND SERVANT—Fellow Servants.—When a fireman is injured through the negligence of the switch tender by want of due care on the part of the engineer it must, in each instance, be deemed the result of the negligence of a fellow servant.—*Tillson v. Maine Cent. R. Co.*, Me., 67 Atl. Rep. 407.

105. MASTER AND SERVANT—Injury to Minor Servant.—Children under 14 years of age employed in a cotton factory do not assume the risks of ordinarily patent dangers not within the scope of their capacity to appreciate and avoid.—*Beck v. Standard Cotton Mills*, Ga., 57 S. E. Rep. 998.

106. MASTER AND SERVANT—Personal Injuries.—An employee held not entitled to recover for personal injury caused by a pane of glass falling while he closed a window.—*Rockstrow v. Astoria Marble Co.*, 105 N. Y. Supp. 501.

107. MASTER AND SERVANT—Safe Place to Work.—Where an employee engaged in transporting material to a platform in a wheelbarrow along a runway was followed by others, so that he could not return on the same runway, he was not guilty of contributory negligence in attempting to return on another runway provided for the purpose, and from which he fell and was killed.—*Morrissey v. Dwyer*, 105 N. Y. Supp. 521.

108. MECHANICS' LIENS—Farm Lands Surrounding Building.—Where a building was erected upon a tract of 1,293 acres of farm land held, that the whole tract was not subject to the mechanic's lien.—*Filston Farm Co. of Baltimore County v. Henderson & Co.*, Md., 67 Atl. Rep. 228.

109. MINES AND MINERALS—Apexing Veins.—Senior location takes the entire width of the vein on its dip, where the apex is partly between two or more adjacent lode mining claims.—*Lawson v. United States Min. Co.*, U. S. S. C., 27 Sup. Ct. Rep. 15.

110. MORTGAGES—Consideration.—Where, in an action to foreclose a mortgage, the mortgagor alleges that the same was executed without consideration, the burden is on him to overcome the presumption of consideration raised by the seal on the mortgage.—*Quackenbush v. Mapes*, 105 N. Y. Supp. 654.

111. MORTGAGES—Exchange of Land by Creditor.—Where land conveyed to secure a debt is exchanged for other land, the debtor may require the creditor to account for the value of the land exchanged, the value of the land taken in exchange, or the specific property received.—*Dybdal v. Fagerberg*, Minn., 112 N. W. Rep. 018.

112. MORTGAGES—Foreclosure.—An owner of land sold at public auction on foreclosure can come into equity, when the purchaser made untrue representations whereby other persons were prevented from bidding, and by which the land was obtained at an undervaluation.—*Carr v. Graham*, Ga., 57 S. E. Rep. 575.

113. MUNICIPAL CORPORATIONS—Care of Streets.—A municipal corporation is not an insurer of the safety of persons using streets, and when they are in reasonably safe condition it is not chargeable with negligence.—*City of Dayton v. Glaser*, Ohio, 81 N. E. Rep. 991.

114. MUNICIPAL CORPORATIONS—Nuisance Per Se.—An extension of a vault under a sidewalk held to be a nuisance per se.—*City of New York v. Peyster*, 105 N. Y. Supp. 612.

115. MUNICIPAL CORPORATIONS—Powers.—One dealing with a municipal corporation is presumed to know what its powers are, and, if he performs services for it beyond its powers to contract therefor, he cannot recover compensation.—*Burns v. City of New York*, 105 N. Y. Supp. 605.

116. MUNICIPAL CORPORATIONS—Public Buildings.—Under Rev. Laws, ch. 25, § 15, and Const. Declaration of Rights, art. 19, and in view of enactments in numerous city charters, a city held to possess power to erect a hall in which the citizens thereof may exercise their right to assemble to consider public affairs.—*Wheelock v. City of Lowell*, Mass., 81 N. E. Rep. 977.

117. NAVIGABLE WATERS—Riparian Rights.—The owner of flats has in them an estate in fee subject only to the public rights of fishing, fowling, and passing over them in boats.—*Chase v. Cochran*, Me., 67 Atl. Rep. 320.

118. NEGLIGENCE—Proximate Cause.—A negligent act may be the proximate cause of the injury, though not the sole cause, where the intervening act is set in motion or induced by the negligent act, and the consequence is one that should have been foreseen.—*Dannenbower v. Western Union Telegraph Co.*, Pa., 67 Atl. Rep. 207.

119. PARENT AND CHILD—Abandonment of Child.—A father who voluntarily abandons his child before it is born, and afterwards, leaving it in a dependent condition, is guilty of a misdemeanor under Pen. Code 1895, § 114.—*Moor v. State*, Ga., 57 S. E. Rep. 1016.

120. PARENT AND CHILD—Support of Parent.—An agreement signed by the children of plaintiff under which they contracted with each other to pay a certain sum monthly for her support was a valid contract, under Civ. Code 1895, § 3637.—*Worth v. Daniel*, Ga., 57 S. E. Rep. 998.

121. PARTIES—Proper Parties.—Whether one interested in the result of a suit should be made a party defendant is in the discretion of the trial court, under Code Civ. Proc. 1902, § 189.—*Murray Drug Co. v. Harris*, S. Car., 57 S. E. Rep. 1109.

122. PRINCIPAL AND AGENT—Authority of Traveling Salesman.—A traveling salesman held to have no implied authority to bind his principal by an agreement that goods sold a customer might be returned if not sold by a certain time.—*N. Friedman & Sons v. Kelly*, Mo., 102 S. W. Rep. 1066.

123. PROCESS—Publication.—An affidavit for service by publication held a substantial compliance with Code Civ. Proc. § 412, though it failed to expressly state the result of the affiant's inquiries concerning the presence of the defendants sought to be served within the state.—*Chapman v. Moore*, Cal., 91 Pac. Rep. 324.

124. RAILROADS—Baggage of Passenger.—A railroad company is not an insurer of the safe transportation of a passenger's property or effects when such property is not placed in its custody.—*Cohen v. New York Cent. & H. R. Co.*, 105 N. Y. Supp. 453.

125. RAILROADS—Infant Trespassers.—In determining what is wanton conduct of a railroad as to an infant trespasser of tender years on one of its cars, due consideration must be given to the limited ability of young persons to take adequate means to avoid danger.—*Charleston & W. C. Ry. Co. v. Johnson*, Ga., 57 S. E. Rep. 1064.

126. RECEIVING STOLEN GOODS—Accessory.—The offense of receiving stolen goods is a distinct crime, but the guilt of the principal must be shown before a conviction of the accessory.—*Wright v. State, Ga.*, 57 S. E. Rep. 1030.

127. REMOVAL OF CAUSES—Separable Controversies.—A joint suit, brought by a resident of this state against a foreign railroad corporation and three resident employees for an injury from negligence, is not removable by the corporation as a separable controversy.—*Southern Ry. Co. v. Miller, Ga.*, 57 S. E. Rep. 1090.

128. SALES—Breach of Contract.—Under the provision of a contract of sale of an automobile that the seller furnish a chauffeur to teach the buyer to operate it, held, the seller was liable to the buyer for an accident from the careless and reckless running of the machine by the chauffeur in testing its operation.—*Burnham v. Central Automobile Exch., R. I.*, 67 Atl. Rep. 429.

129. SALES—Opinion as to Evidence.—Where a vendor knows that the vendee's opportunity to learn the facts does not place him on an equal ground with the vendor, the expression of an opinion as to value becomes the statement of a material fact.—*Champion Funding & Foundry Co. v. Heskett, Mo.*, 102 S. W. Rep. 1050.

130. SALES—Patent Defects.—If the purchaser of machinery inspects the same, makes a cash payment, gives his note for the remainder and receives the property without objection, he cannot, after the note has matured, plead the existence of patent defects.—*Baxley v. The Co. v. Simpson & Harper, Ga.*, 57 S. E. Rep. 1090.

131. SEAMEN—Liability of Vessel for Injury to Seaman.—A vessel held not liable to a seaman injured in the Straights of Magellan for proceeding in her course for seven or eight days before obtaining surgical treatment for libellant's dislocated shoulder, instead of returning 70 miles to the nearest port, where the master believed, after examination, that there was no dislocation, but only a sprain.—*The Cuzco, U. S. C. C. of App.*, Second Circuit, 154 Fed. Rep. 177.

132. STREET RAILROADS—Duty to Keep Car Under Control.—It is the duty of the operators of an electric street car to keep it under reasonable control while passing through well-populated districts, and especially while approaching street crossings.—*Groat v. Central Electric Ry. Co., Mo.*, 102 S. W. Rep. 1026.

133. STREET RAILROADS—Injury to Passenger.—Where a passenger to prevent spitting on the floor of a street car stuck his head beyond the margin of the car and was struck by a pole near the track, he was entitled to recover for the injuries received.—*City Electric Railway Co. v. Salmon, Ga.*, 57 S. E. Rep. 926.

134. STREET RAILROADS—Injury to Passenger.—Where a passenger on a street car was injured by stepping on an electrified metal plate in the passageway of a car and receiving an electric shock, the burden was on defendant to show that the presence of the electricity could not have been detected or prevented by the exercise of the highest degree of care.—*McRae v. Metropolitan St. Ry. Co., Mo.*, 102 S. W. Rep. 1032.

135. SUBROGATION—Collateral Securities.—A person who, though not the real debtor, is liable for the payment of the debt, may pay the same and be subrogated to the rights of the creditor in any pledge or collateral security.—*Polhemus v. Prudential Realty Corp., N. J.*, 67 Atl. Rep. 303.

136. TAXATION—Tax Sale.—A purchase at tax sale by one on whom the duty of paying the taxes rests operates as a payment of the taxes and leaves the title as if payment had been made before sale.—*McCune v. Goodwillie, Mo.*, 102 S. W. Rep. 997.

137. TELEGRAPHS AND TELEPHONES—Delay in Delivering Message.—A telegraph company held negligent where it made no attempt to deliver a night message until 1 o'clock p. m. on the day succeeding that on which it was received at the telegraph company's receiving office.—*Western Union Telegraph Co. v. Lehman & Bro., Md.*, 67 Atl. Rep. 241.

138. TELEGRAPHS AND TELEPHONES—Delay in Delivery.—In an action for negligent delay in the delivery of a telegram held, that the showing that thereby plaintiffs had been prevented from making a purchase on which they would have made a profit entitled them to recovery.—*Western Union Telegraph Co. v. True, Tex.*, 103 S. W. Rep. 1180.

139. TRESPASS—Persons Liable.—One who directs or authorizes a trespass is equally and jointly liable with him who commits it.—*Chase v. Cochran, Me.*, 67 Atl. Rep. 320.

140. TRIAL—Parties to Action.—In a suit to vacate a judgment rendered against plaintiff and to cancel deeds and vendor's lien notes forming the basis of the judgment, the refusal to submit an issue held erroneous in view of the evidence.—*Cage & Crow v. Owens, Tex.*, 103 S. W. Rep. 1191.

141. TRUSTS—Depreciation of Securities.—Where a part of a trust fund was invested in government and railroad bonds, the trustee was not chargeable with a depreciation in the value thereof, owing to their approaching maturity.—*In re Hunt, 105 N. Y. Supp.* 606.

142. WATERS AND WATER COURSES—Changing Channel of Stream.—The owner of land through which a river ran had no right to turn the stream into a ditch constructed so near plaintiff's land that water would encroach thereon, and cut into the same by reason of the breaking down of the banks.—*Desberger v. University Heights Realty & Development Co., Mo.*, 102 S. W. Rep. 1060.

143. WATERS AND WATER COURSES—Rights of Mill Owner.—A mill owner, using the waters of a stream as the power for operation thereof, may only maintain a head of water and let it out at such times and in such quantities as is reasonable and proper for the use of his mill; but if, within a reasonable exercise of those rights, a lower riparian owner sustains injury, the mill owner is not liable therefor.—*Barker v. French, Me.*, 67 Atl. Rep. 305.

144. WEAPONS—Carrying Concealed Weapons.—An indictment under Pen. Code, § 342, is sufficient which alleges the carrying of a pistol to "a place of worship," and locates that place by name, though it fails to charge that any public gathering was being held at the time.—*Amorous v. State, Ga.*, 57 S. E. Rep. 999.

145. WILLS—Obliteration of Bequest.—The obliteration of a bequest to C, the wife of testator, held not to affect a will where C had a former husband living.—*Collard v. Collard, N. J.*, 67 Atl. Rep. 190.

146. WILLS—Value of Gift to Charity.—In arriving at the value of gifts to charity, held, that present value of life estate, together with other noncharitable legacies, should be deducted from total estate, and the balance only will represent the value of gifts to charity.—*In re Strang, 105 N. Y. Supp.* 566.

147. WITNESSES—Impeachment.—A party cannot impeach a witness he introduces, unless he is entrapped by such witness.—*Alexander v. State, Ga.*, 57 S. E. Rep. 996.

148. WITNESSES—Privileged Communications.—The production by the attorney of any paper which the client as a witness may be compelled to produce is not privileged.—*Bankers' Money Order Assn. v. Nachod, 105 N. Y. Supp.* 773.

149. WITNESSES—Subpoena Duces Tecum.—A petition for a subpoena duces tecum is sufficiently definite with respect to the books or documents required, where the description is specific enough to enable the witness to produce them without uncertainty.—*United States v. Terminal R. Assn., U. S. C. C., E. D. Mo.*, 1154 Fed. Rep. 268.

150. WITNESSES—Use of Memorandum.—A witness cannot, without finally testifying from his recollection of the facts, swear from a memorandum, without showing that he made it or knew it to be correct.—*Proctor & Gamble Co. v. Blakely Oil & Fertilizer Co., Ga.*, 57 S. E. Rep. 879.